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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 594

PETER ROSSI AND EDWARD EHRETT,
PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1933

CERTIORARI GRANTED FEBRUARY 6, 1933

(37,291)

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1 Pleas in the District Court of the United States of America, within and for the Northern Division of the Southern District of Illinois, held at the City of Peoria, in said Division and District, before the Honorable Louis FitzHenry, Judge of said Court, on Monday, the 20th day of October, in the year of our Lord One Thousand Nine Hundred and Thirty, and of the Independence of the United States of America, the One hundred and Fifty-fifth year.

Present:

Louis FitzHenry, District Judge.

Walter M. Provine, U. S. Attorney.

C. W. Cushing, U. S. Marshal.

S. T. Burnett, Clerk.

Attest:

S. T. Burnett, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Northern Division.

The United States, *vs.* Peter Rossi, alias Peter Russo and Edward Ehrett.	No. 1272. Indictment. Operating a still without payment of tax, etc.

Be it remembered that heretofore to wit: on the 5th day of November, in the year of our Lord one thousand nine hundred and thirty, that being one of the days of the October term, A. D. 1930, of the district court of the United States, for the Northern Division of the Southern District of Illinois, the grand jurors of the United States of America, chosen, selected, and sworn, within and for the Northern Division of the Southern District of Illinois, came into open court and presented an indictment against Peter Rossi, alias Peter Russo and Edward Ehrett, for "Operating a still without payment of tax, etc.," which said indictment was signed by the district attorney and indorsed by the Foreman of said Grand Jury, as a true bill, and was and is in the words and figures, following, to wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Northern Division.

Docket No. .....

Pre. Pro.
Walter M. Provine
U. S. Attorney

UNITED STATES OF AMERICA.

At the October Term thereof, A. D. 1930.

Southern District of Illinois, } ss.
Northern Division. }

The Grand Jurors of the United States of America, impaneled, sworn and charged in the District Court of the

United States of America, within and for said Northern Division of the Southern District aforesaid, at the term aforesaid, of the court aforesaid, in the year of our Lord Nineteen Hundred Thirty, and inquiring within and for said Northern Division of said Southern District, upon their oath present, that Peter Rossi, alias Peter Russo and Edward Ehrett, on, to wit, the Tenth day of September, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Pekin, in the County of Tazewell, in the State of Illinois, in the said Northern Division of the Southern District aforesaid, within the Eighth Internal Revenue Collection District of Illinois, within the Thirteenth Prohibition District of the United States of America, and within the jurisdiction of this court, did then and there wilfully, knowingly, fraudulently, unlawfully and feloniously engage in and carry on the business of a distiller, within the meaning of the Internal Revenue Laws of the United States of America, that is to say, the business of then and there producing distilled spirits, to wit, One hundred ten gallons of uncolored spirituous liquor, commonly known and described as moonshine whiskey and hootch, and Ten gallons of colored spirituous liquor, commonly known and described as moonshine whiskey and hootch, with intent then and there in them, the said Peter Rossi, alias Peter Russo and Edward Ehrett, then and there to defraud the United States of the special tax, to wit, the tax of One Dollar and Ten Cents ($1.10), upon each proof gallon of the said distilled spirits, so then and there distilled and to be distilled by them, the said Peter Rossi, alias Peter Russo and Edward Ehrett, as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

4 Second Count.

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that the said Peter Rossi, alias Peter Russo, and Edward Ehrett, hereinafter called the Defendants, on, to wit, the Tenth day of September, in the year of our Lord Nineteen Hundred Twenty-Nine, at, to wit, the City of Pekin, in the County of Tazewell, in the State of Illinois, in the said Northern Division of the Southern District aforesaid, within the Eighth Internal Rev-

enue Collection District of Illinois, within the Thirteenth Prohibition District of the United States of America, and within the jurisdiction of this court, did then and there wilfully, knowingly, unlawfully, fraudulently and feloniously engage in and carry on the business of a distiller, that is to say, the said Defendants did then and there engage in and carry on the business of separating alcoholic spirits, to wit, one hundred twenty gallons of alcoholic spirits, commonly known and described as moonshine whiskey, and hootch, from a fermented substance, to wit, fermented corn sugar mash, by the process of evaporizing the said fermented corn sugar mash, in a certain still, to wit, one certain fifteen gallon still, having connected therewith a worm, one-half inch in diameter and ten feet in length, the said worm being then and there contained in a fifty-gallon barrel, and the said still then and there having connected thereto, and used in connection therewith, certain other machinery and apparatus, to wit, one, one-hundred-gallon condenser, one four-horse-power steam boiler with oil burner, and one, one-quarter-horse-power electric motor, they, the said Defendants, then and there intending to defraud the United States of America of the special tax, to wit, the tax of One Dollar and Ten Cents ($1.10), imposed by the provisions of the Internal Revenue Laws of the United States of America, upon each proof gallon of said alcoholic spirits so distilled and to be distilled by them as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

5 Third Count.

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that the said Peter Rossi, alias Peter Russo and Edward Ehrett, hereinafter called the Defendants, on, to wit, the Tenth day of September, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Pekin, in the County of Tazewell, in the State of Illinois, in the said Northern Division of the Southern District aforesaid, wtihin the Eighth Internal Revenue Collection District of Illinois, within the Thirteenth Prohibition District of the United States of America, and within the jurisdiction of this court, did then and there wilfully, knowingly, fraudulently, unlawfully and feloniously

carry on the business of a distiller, without having given bond as required by law, that is to say, the said Defendants did then and there produce a large quantity of distilled spirits, to wit, one hundred twenty gallons, more or less, of alcoholic spirits, commonly known and described as moonshine whiskey and hootch, (the exact quantity thereof being to the Grand Jurors unknown), and did then and there brew and make a large quantity of corn sugar mash, fit for distillation, and for the production of said alcoholic spirits, (the quantity of said corn sugar mash being to the Grand Jurors unknown), and did then and there, by a process of evaporizing the same in a certain still, to wit, one certain fifteen-gallon still, having connected therewith a worm, one-half in in diameter and ten feet in length, the said worm being then and there contained in a fifty-gallon barrel, and the said still then and there having connected thereto, and used in connection therewith, certain other machinery and apparatus, to wit, one 100-gallon condenser, one 4-horse power steam boiler with oil burner, and one ¼-horse power electric motor, separate alcoholic spirits, to wit, the said one hundred twenty gallons, more or less, of alcoholic spirits, from a fermented substance, to wit, from the said fermented corn sugar mash, without having theretofore executed a bond with at least two sureties, approved by the Prohibition Administrator of the Thirteenth Prohibition District of the United States of America, for a penal sum of not less than the amount of tax on the spirits that could be distilled in the said distillery
6 during a period of fifteen days, but not exceeding the sum of One Hundred Thousand Dollars ($100,000.00), in a form prescribed by the Commissioner of Prohibition of the United States of America, and conditioned that they, the said Defendants, would faithfully comply with all the provisions of law relating to the duties and business of distilleries, and would pay all penalties incurred, or fines imposed on them, the said Defendants, for a vioation of any of the said provisions of law, and that they, the said Defendants, would not suffer the lot or tract of land on which the said distillery should stand, or any part thereof, or any of the distilling apparatus, to be encumbered by mortgage, judgment or other lien, during the time in which they, the said Defendants, should carry on said business of a distiller as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fourth Count.

And the Grand Jurors aforesaid inquiring as aforesaid, upon their oath aforesaid, do further present that the said Peter Rossi, alias Peter Russo and Edward Ehrett, hereinafter called the Defendants, on, to wit, the Tenth day of September, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Pekin, in the County of Tazewell, in the State of Illinois, in the said Northern Division of the Southern District aforesaid, within the Eighth Internal Revenue Collection District of Illinois, within the Thirteenth Prohibition District of the United States of America, and within the jurisdiction of this court, did then and there wilfully, knowingly, unlawfully, fraudulently and feloniously have in their possession and under their custody and control, a certain still, set up, to wit, one certain fifteen-gallon still and coil, having attached thereto, and used in connection therewith, one certain 100-gallon condenser, one certain 4-horse power steam boiler, with oil burner, driven by a
7 certain ¼-horse power electric motor, and one certain ½-horse power electric motor and pump, together with all other necessary attachments and adjustments thereto pertaining, necessary and essential for the operation thereof, which said still had not then and there and theretofore been registered with the Prohibition Administrator of the United States of America, in and for the said Thirteenth Prohibition District of the United States of America, by subscribing and filing with the said Prohibition Administrator, immeditaely upon said still being set up, or at any time thereafter, duplicate statements in writing, setting forth the particular place where said still was set up, the kind of still so set up, the cubic content thereof, the owner or owners thereof, his or their place or places of residence, and the purpose for which the said still had been or was intended to be used, which said still was then and there capable of, and was intended and designed, on the parts of the said Defendants, for the unlawful production, of distilled spirits, to wit, alcoholic spirits, commonly known and described as moonshine whiskey and hootch, to be used for beverage and commercial purposes; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Fifth Count.

And the Grand Jurors aforesaid, inquiring as aforesaid, upon their oath aforesaid, do further present that the said Peter Rossi, alias Peter Russo and Edward Ehrett, hereinafter called the Defendants on, to wit, the Tenth day of September, in the year of our Lord Nineteen Hundred Twenty-nine, at, to wit, the City of Pekin. in the County of Tazewell, in the State of Illinois, in the said Northern Division of the Southern District aforesaid, within the Eighth Internal Revenue Collection District of Illinois, within the Thirteenth Prohibition District of the United States of America, and within the jurisdiction of this court, being then and there engaged in carrying on the business of a distiller, and having theretofore distilled a large quantity of distilled spirits, to wit, one hundred twenty gallons of alcoholic spirits, commonly known and described as moonshine whiskey and hootch, then and there intended by the said Defendants to be used for beverage and commercial purposes, they, the
8 said Defendants, did then and there wilfully, knowingly, unlawfully, fraudulently and feloniously defraud, and attempt to defraud, the United States of America of the special tax imposed thereon, by the Internal Revenue Laws of the United States of America, to wit, the tax of One Dollar and Ten Cents ($1.10), per proof gallon of the said one hundred twenty gallons of alcohol spirits, so then and there distilled as aforesaid, by the said Peter Rossi, alias Peter Russo and Edward Ehrett; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WALTER M. PROVINE,
United States Attorney.

Endorsed: "A true bill, H. W. Tremann, Foreman." Filed Nov 5 1930 S. T. Burnett, Clerk.

9 And afterwards, to wit: on the 17th day of November, A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

10 * * (Caption) * *

Monday, November 17, 1930.

Court met pursuant to adjournment.

Present: The Honorable Louis FitzHenry, Judge.

And now on this 17th day of November, A. D. 1930, comes the United States, the plaintiff in this case by Walter M. Provine, Esq., United States attorney for the Southern District of Illinois and come also the defendants Peter Rossi, alias Peter Russo and Edward Ehrett in their own proper persons and by J. E. Dougherty, Esq., their attorney. And the said defendants being arraigned on the indictment herein for plea thereto each for himself says he is not guilty as therein charged. And the said defendants by their attorney enter a motion to suppress the evidence herein.

And now issue being joined, this cause is submitted to the court for trial without the intervention of a jury, the said defendants waive trial by jury, and after hearing a part of the evidence in this cause, the hour for adjournment having arrived, the further trial hereof is postponed until 9 o'clock A. M. tomorrow.

11 And afterwards. to wit: on the 18th day of November, A. D. 1930, the following further proceedings were had in said court in said case and were entered of record, to wit:

12 * * (Caption) * *

Tuesday, November 18, 1930.

Court met pursuant to adjournment.

Present: The Honorable Louis FitzHenry, Judge.

And now on this 18th day of November, A. D. 1930, come again the parties to this cause by their respective attorneys and the further trial hereof is resumed, and after hearing the remainder of the evidence, the arguments of the respective attorneys, the court finds the defendants and each of them guilty. Thereupon the said defendants enter a motion for a new trial, which motion is then and there denied. To

which ruling of the court the defendants by their attorney duly excepted. Then the said defendants by their attorney enter a motion in arrest of judgment. It is ordered by the court that pending the disposition of the motion in arrest of judgment the said defendants Peter Rossi, alias Peter Russo and Edward Ehrett be enlarged on a bond of Five Thousand Dollars each.

13 And afterwards, to wit: on the 18th day of December, A. D. 1930, the following further proceedings were had in said court in said case and were entered of record to wit: Ente 18

14 * * (Caption) * *

Thursday, December 18, 1930.

Court met pursuant to adjournment.

Present: the Honorable Louis FitzHenry, Judge.

And now on this 18th day of December, A. D. 1930, comes again the United States the plaintiff in this case by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and come also the defendants Peter Rossi, alias Peter Russo and Edward Ehrett in their own proper persons and by John E. Dougherty, Esq., their attorney and the court having heard and duly considered the motion of said defendants for a new trial and being thus fully advised in the premises, overruled the same, to which ruling of the court the defendants by their attorney then and there duly excepted. And thereupon the said defendants entered a motion in arrest of judgment and the court having heard and duly considered the same, it is ordered that said motion be, and is hereby overruled, to which ruling of the court the defendants then and there by their attorneys duly excepted. Judgment on the verdict.

And the said defendants now being arraigned at the bar of the court for sentence and each having nothing to say why sentence should not be pronounced against him. It is therefore considered and adjudged by the court that the said defendants Peter Rossi, alias Peter Russo and Edward Ehrett

15 for the offenses by each committed in manner and form as charged in counts one, two and three of the said indictment and as found by the jury in this case, each be

confined in the United States Penitentiary at Leavenworth, Kansas, for a period of eighteen months on each of said counts, the sentences of imprisonment herein pronounced on counts one and two of said indictment to run concurrently with sentence of imprisonment pronounced on said count three of said indictment—and for the offense by each committed in manner and form as charged in count four of the said indictment and as found by the jury in this case be confined in the said United States Penitentiary, at Leavenworth, Kansas, for a period of eighteen months, the sentence of imprisonment herein pronounced to run consecutively to the sentence of imprisonment pronounced on counts one, two and three of said indictment—and also to each pay a fine to the United States in the sum of five hundred dollars on each of counts one, three and four of the said indictment, together with the costs of this prosecution, amounting to the sum of dollars, that execution issue therefor and that said defendants stand committed in said United States Penitentiary, at Leavenworth, Kansas, until the amounts of their respective fines and costs shall have been fully paid or until otherwise discharged by due process of law.

And it is further ordered by the court that the clerk issue a writ of commitment commanding the Marshal to forthwith take the said Peter Rossi, alias Peter Russo and Edward Ehrett and to deliver them together with a true copy of said writ of commitment to the Warden of the United States Penitentiary at Leavenworth, Kansas.

15a It is further ordered by the court that the verdict herein as to count five of the said indictment be, and is hereby set aside and the said defendants Peter Rossi, alias Peter Russo and Edward Ehrett, found not guilty of the charge therein.

16 * * (Caption) * *

BILL OF EXCEPTIONS.

Appearances:

For the United States of America: Marks Alexander, Esq., Asst. U. S. Atty., Robt. A. Stephens, Jr., Asst. U. S. Atty.

For the Defendants: John E. Dougherty, Esq., Peoria, Ill.

17 Be It Remembered that heretofore, on to-wit, Nov. 17, A. D. 1930, there was filed by the defendants herein with the Clerk of this Court, their certain Motion to Suppress Evidence, which said Motion is in the words and figures as follows, to-wit:

* * (Caption) * *

MOTION TO SUPPRESS EVIDENCE.

"Now comes the above named Peter Rossi and Edward Ehrett, defendants herein, and being each sworn on his oath, deposes and says that on the 10th day of September, A. D. 1928, they were each guests, and as such guests temporarily domiciled at the private dwelling of one Nellie Faux, in the City of Pekin, Illinois.

"Your affiants further show to the Court that on said 10th day of September, A. D. 1929, certain Federal Prohibition Agents, acting as Federal Prohibition Agents, without any warrant or other writ of authority to either search said premises or to arrest any person in or upon said premises, did go upon said premises, and enter into said private dwelling on said premises, and did then and there search said pri-
18 vate dwelling and seize and confiscate the following property, to-wit:

Some alleged colored spirituous liquor
Some alleged corn sugar mash
One alleged still and worm
A barrel
An alleged condenser and boiler with oil burner
One electric motor and other property,

and did then and there arrest your affiants.

"Your affiants further show to the court that said search, seizure and arrest was and is illegal and unlawful, and in violation of the Constitution and Laws of the United States and your affiants' rights thereunder.

"Your affiants further respectfully show to the court that the United States Attorney for this District purposes to use as evidence on the trial of this cause all of the articles and things so seized as aforesaid, and to permit said United States Attorney to so use said articles and things as evidence against your affiants on the trial of this cause is and would

be in violation of your affiants' rights under the Constitution and Laws of the United States.

"Your affiants respectfully petition this Honorable Court to order and direct that all of said articles and things so seized as aforesaid shall be suppressed and not used as evidence on the trial of this cause, and that the United States Attorney of this District shall, by order and direction of this Court, be ordered and directed not to use any of said articles or things so seized as aforesaid, as evidence on the
19 trial of this cause, or any of the evidence obtained by or through said search or seizure on the trial of this cause.

(Signed:) PETER ROSSI
(Signed:) EDWARD EHRETT"

UNITED STATES OF AMERICA

State of Illinois, }
Peoria County. } ss.

PETER ROSSI, being first duly sworn on his oath, deposes and says that he is the same person whose name is subscribed to the foregoing affidavit and petition; that he knows the contents thereof and that the same is true, except as to the matters of law set forth therein, and those matters he believes are true.

(Signed:) PETER ROSSI.

Subscribed and sworn to before me this 17th day of Nov., A. D. 1930.

S. T. BURNETT
(Seal) *Clerk, U. S. Dist. Court.*

UNITED STATES OF AMERICA

State of Illinois, }
Peoria County, } ss.

EDWARD EHRETT, being first duly sworn on his oath, deposes and says that he is the same person whose name is subscribed to the foregoing affidavit and petition; that he knows the contents thereof and that the same is true, except

as to the matters of law set forth therein, and those mat-
20 ters he believes are true.

(Signed.) EDWARD EHRETT.

Subscribed and sworn to before me this 17th day of Nov., A. D. 1930.

S. T. BURNETT
(Seal) *Clerk, U. S. Dist. Court.*

The above entitled cause of the United States of America -vs.- Peter J. Rossi and Edward Ehrett. No. 1272, having previously been set for trial on said 17th day of November, A. D. 1930, it was thereupon ordered by the Court that said Motion to Suppress Evidence would be heard and decided upon the evidence offered in the trial of said cause.

And Be It Further Remembered that thereafter, on to-wit, November 17, 1930, there was filed with the Clerk of this Court by the defendants Rossi and Ehrett herein, their Waiver of Right of Trial by Jury, which said Waiver is in the words and figures as follows, to-wit:

21 * * (Caption) * *

WAIVER OF RIGHT OF TRIAL BY JURY.

Come now the Defendants, Peter Rossi and Edward Ehrett, in their own proper person, and hereby in writing waive the right of trial by jury and agree to the trial of the issues in this cause by the Court, without the intervention of a jury.

(Signed:) PETER ROSSI
(Signed:) EDWARD EHRETT

And Be It Further Remembered that thereafter, on to-wit, November 17, A. D. 1930, the same being one of the days of the October A. D. 1930 Term of said Court, the above entitled cause came on for hearing before Honorable Louis FitzHenry, Judge, without a jury, whereupon the following proceedings were had, to-wit:

22 EVIDENCE ON THE PART OF THE GOVERNMENT.

Testimony of A. E. WHEELER:

Examination conducted by Robert A. Stephens, Jr.

My name is A. E. Wheeler. (Stipulation that the witness is and was a Prohibition Agent during the month of September, 1929.) I am acquainted with the premises located at 1516 South Fifth Street, Pekin, Illinois. On September 8th, 1929, at about six o'clock in the morning, I went to the premises there, or by the premises, I didn't go on to the lot—and you could smell fermenting mash from there, and you could also hear the buzz or the hum of an electric pump in the basement.

On September 10, 1929, at about nine or ten o'clock, several agents went to those premises. Mr. Moore first. This is a one-story frame building that faces the west. Mr. Moore and I walked around the south side of the building anod Mr. Johnson and some one else went around the north side of the building, and we met at the back. There had been a hole dug down by the side of the brick wall to the basement, and a hole knocked through that wall, and a double door put in there. We met at that back door, and Agent Johnson said, "Hello," or something, in a rather louder voice than usual, and we could hear two men's voices on the inside. After a lapse of a few minutes, Mr. Ehrett came to the door. This door came out of the basement. Mr. Johnson asked him if he had a still down there, and he said "No." Johnson
23 asked him if he cared if we went down and saw, and he said "No," and he started to walk out, and Johnson said, "No, you go down with us," and Johnson and Ehrett walked into the basement, followed by the other agents or some of the other agents. I went into the basement with them.

We found about a ten horse-power boiler and a three hundred gallon still with a column. First, there had originally been a cellar way leading from the kitchen into this basement. The steps of this cellar way to the ceiling had been taken out.

(Objection, Motion to Strike, and Motion allowed as to the latter part of the answer.)

The Witness: At the back of the building was a small

place probably three and one-half or four feet by ten feet leading from the basement into the attic; on the first floor level there was a door from a room leading into this four by ten foot compartment or apartment. There was a column about nine feet long running from this still up through this four by ten compartment, and this column was in such a position that the door from the kitchen could not be opened; it was nearly against that door. In the attic was a condenser. Then there was a quantity of alcohol found in the basement. There was no mash. This was a re-running or re-cleaning still.

There was a quantity of alcohol found in the basement and a quantity of five-gallon cans. This boiler was fed by a fuel oil burner and there was a motor that supplied pressure for that. There was also a motor pump in this basement. Then over in one corner of the basement was a little, perhaps
24 a fifteen-gallon still with a coil in a barrel and two barrels of mash over there; and near that was a fifteen-gallon keg of some kind of alcoholic liquor.

We had some conversation with Mr. Ehrett but not much. He told us that the outfit belonged to him. Then some of the agents who were at the front of the building said that there was another man in there, and Agent Moore and myself climbed up this column up into the attic, and found Mr. Rossi back under the eaves behind some wood that projected, lying down in behind that. We brought him down. He had on a blue work shirt and had some grease and oil on his hands. I had no conversation with Mr. Rossi.

I tasted the alcohol that we found there by using a hydrometer. It tested over 180 proof, which would be 90 per cent of alcohol by volume. I also smelled it. In my opinion it was alcohol. I was a guager and storekeeper in the Internal Revenue Department before I went into the Prohibition Service.

There were twenty-two five-gallon cans and this fifteen-gallon keg, making about one hundred twenty-five gallons which would make about one hundred ninety-eight proof gallons besides the fifteen gallon keg.

I did not test this fifteen-gallon keg except to smell it. It was alcohol.

This one electric motor furnished pressure on a tank from which oil went to the burners under the boiler; the steam from the boiler went through a coil in the bottom of the still and heated the alcohol that they were redistilling, and the al-

coholic vapor arose through this column and was cooked and condensed in the condenser in the attic, and came back in the down spout.

25 There was no worm connected with the fifteen-gallon still. The still just sat there on the burner; it wasn't heated by steam. That still was not in operation. There was a worm or coil that went into a barrel for a condenser—a fifty gallon barrel. That worm was for this fifteen gallon still. It was not in operation but it was set up ready for operation.

Mr. Ehrett and several other agents and myself were standing there and Mr. Ehrett said, "couldn't we fix this," and I said, "Yes, you can fix it with the Judge."

There was a Ford car sitting in the yard at the side of the house. Ehrett stated that the car belonged to his wife. He asked about keeping the car to make a living, and we found his tools in the car. We seized the car and told him he could have his tools. This place was located in Pekin, Tazewell County, Illinois.

The mash that we found was a sugar—a sacharine mash, with a little grain in it.

Cross-Examination by Mr. Dougherty.

I was a witness on the preliminary hearing of this case, conducted before William H. Moore, United States Commissioner here in Peoria. I don't know the date of that hearing, and can not say whether it was one week or one, two, three, four, five or six months after we made this arrest. I know it wasn't six months. I was sworn to tell the truth on that hearing.

Mrs. Nellie Faux lived on the first floor of these premises. It was fitted up as an ordinary dwelling house or home

26 that a person would live in, and from the front it had the appearance of a dwelling house. After we entered it, we found a kitchen and a dining room and a living room and bedrooms, equipped with furniture and other equipment used in keeping house.

After some of the agents left, and after we had been in the basement, we went to the front door, and Mrs. Faux invited us in. We had been in the basement and attic before this. This invitation was after Ehrett and Rossi had been arrested.

I did not testify before the Commissioner that Ehrett said

that he owned the still. I don't know whether it was asked of me. I was not there to testify all that I knew about it.

I tested one can by the hydrometer, and I tested the others as they were dumped by smell. I don't know what proof the other cans were. I only know about the other cans from my judgment.

I did not see Ehrett or Rossi operate any still there. The still was fired up. There was a little alcohol coming out of the goose neck. I don't know how much. We did not save any that came out of the still. I did not see Rossi attending any still. Some of the alcohol which came from the column was saved. It is in the store rooms. I will produce this exhibit.

Redirect Examination by Mr. Stephens.

I was there when the try box was dismantled. As I remember, there was alcohol coming out of the try box, and there was some in the column and some in the condenser.

27 GLENWOOD JOHNSON.

GLENWOOD JOHNSON, a witness called on behalf of the Government, testified as follows:

Direct Examination by Mr. Stephens.

My name is Glenwood Johnson. I am now and was a Prohibition Agent in September, 1929. I visited the premises at 1516 South Fifth Street, Pekin, Illinois, on September 10, 1929, with Agents, Rehm, Thorpe, Wheeler, Moore and a couple of others. Quite a few of us. We had information there was a still in the property, and on that morning, about nine-thirty, we went down there to make an investigation.

As we drove up in front of the place and stopped I could smell the odor of alcohol—the cooking odor. We stopped the car, and with Agent Rehm, I went around to the back on the north side of the house. As we walked by the house, there was an open window there and I looked in and I could see a still and hear the pump of the oil burner in operation. With Agent Rehm I walked around to the back and we could hear a conversation in the basement. I walked around to the

back to where there was a grade entrance or a door that was closed. I called, "Hello," or some conversation, and in a short time a man appeared at the door, and came out, who was later known as Mr. Ehrett. I asked him if he had a still down there and he said, "No," and came on out; and I said, "Do you care if I go down and look?" and he started to leave. I said, "No, you are not going to leave; you
28 are going back with us." And by that time Wheeler and Moore came around from the south side of the house and with Rehm we all went down and found the still in operation.

There was an upright steam boiler of, I should judge, eight or ten horse power, a steam boiler with an oil burner under it; there was approximately a three hundred gallon copper kettle or still; there was a nine foot column extending from where an entrance from the first floor to the basement had been; there was a frame sitting there with a column extended up into the attic, with a hundred gallon condenser up there. There was an electric pump attached in the basement. There was also about a fifteen gallon copper kettle still that was not in use. There was perhaps about ten feet of coil in a barrel used as a condenser which wasn't in operation, and there was two barrels of corn sugar mash that may have had some grain in it for flavoring. There were twenty-two five-gallon cans of uncolored spirits and there was one fifteen-gallon wood keg containing some spirits.

I was present when there was some conversation carried on. Mr. Rossi stated that he had just arrived and that he had been called down there that morning for the purpose of fixing a pump. He said he didn't know there was a still in the premises, but that he had been called down there to fix a pump and had just arrived when we arrived there. I knew Mr. Rossi and he knew me. He stated that he didn't know the still was there and that it wasn't his still.

I tasted and smelled the contents of the twenty-two five-gallon cans. In my opinion it was uncolored spirits, containing more than one-half of one per cent of alcohol by
29 volume. It would have to be diluted to be fit for use for beverage purposes. I tasted and smelled the fifteen-gallon keg. In my opinion, it was colored spirits, containing more than one-half of one per cent of alcohol by volume, and was fit for use for beverage purposes. In my opinion, it was distilled spirits.

I overheard a part of a conversation between Mr. Ehrett

and Agents Wheeler and Moore. It was in regard to fixing it up or leaving the still be.

I brought the samples to the office.

Cross-Examination by Mr. Dougherty.

Agent Rehm and I went around the north side of house and Wheeler around the south side. We arrived at the back at the same time.

When I asked Ehrett if he had a still down there, he said he didn't. Rossi was not down in the place where we found the still. I saw him coming down from up stairs. I took him over to a telephone. I was not there all the time.

I was told by some of the other agents that Ehrett asked if we had a search warrant. Ehrett said something to me about being hit on the jaw.

This place had all of the appearances of a dwelling house. Mrs. Faux stated that she lived there. It was equipped with furniture, and the place where we found the still was in the basement of that house; and everything that we found in that place on that day was under the roof of that dwelling house.

We had no search warrant that I served.

I could see that the still was in operation; alcohol was coming out of it. I said, to my recollection, that it was. I saw no one operate the still. When I tasted the contents of two or three cans I just touched my tongue to it or put my finger in it and put my finger in my mouth and smelled it.

Redirect Examination by Mr. Stephens.

We found a Ford parked alongside of the house. Ehrett stated it belonged to his wife, and he borrowed it from her. He gave me the keys. I told him I had to have the car to bring in. He asked about the box of tools that was in it, and I opened the box and saw that they were tools and he asked if he could have them, and I said "Yes," and gave him the box of tools that was in the back seat of the car. They were regular ordinary working tools.

H. A. MOORE

H. A. MOORE, a witness on behalf of the United States, testified as follows:

Examination by Mr. Stephens.

My name is H. A. Moore. I am now and was a prohibition agent in September, 1929. On September 10, 1929, with other agents, I visited the premises located at 1516 South Fifth Street, at Pekin, Illinois. As we approached we detected the odor of alcohol. Agent Wheeler and I went on the South side of the house in the drive; Agents Thorpe and Garden remained in the front of the premises, and Agents Rehm, Johnson went on the north side of the house. We met Agents Rehm and Johnson—that is, Agent Wheeler and I met
31 Agents Rehm and Johnson at the rear of the premises at a cellar way that went into the basement. Agent Johnson called down, and the defendant Ehrett came from the basement. Agent Johnson said, "Have you a still down there," and he said, "No." Johnson said, "Do you care if I look?" and he said, "No." With that, defendant Ehrett started to walk away from the basement entrance, and Johnson said, "No, you go along with us," and we went in the basement and found two stills, a small one and a large one, the large one in operation. Ehrett turned off the oil burner which was under the steam boiler in operation, and he said it was his plant and wanted to know if he could not fix it up; and we told him there was no chance of doing that. We asked him about the other man. We said there were two men talking before we went down in the basement; that we heard two of them talking. He said that there wasn't any other man, that he was talking to the lady upstairs about a radio. But in crawling up the column of what was the rear basement stairway into the roof space or attic, we found the defendant Rossi. He was crowded in the ceiling of the porch, back in as close as he could get to where the rafters and the roof came down together. There was a shingle sticking up there a little bit, and he was hiding behind the shingle. To get to that place we climbed the pipes that went up to the attic. I told Rossi to go on down stairs. There was some little conversation as he was coming down out of

the attic in which he said this was the second still he had been caught at, and he would have to fix it up. We asked Rossi what
32 he was doing out there at this still, and if he hadn't got enough for one still, and he said he was just sent out and that he came out to fix one of the pumps that wasn't acting right, and got there just before we got there—that he just came.

I had a convesation with Ehrett before this. Ehrett was arguing with Johnson over a search warrant that he had. I told Ehrett that I thought he had shown enough disrespect for the law and for him to sit down in the chair that was over near the south wall. He said he didn't have to do it. I kind of pushed him down in the chair.

Outside the house, we talked to Ehrett about the car and about the tools. He said they were his tools, and he had them when he was in the garage business, and not to take them, they were the only legal means he had of making a living. We put the tools on the rear porch and the bill fold containing mostly bills of sale on cars, were given to him.

Cross-Examination by Mr. Dougherty.

Ehrett told me that he had been in the garage business. I don't remember the radio business. I think he asked if we had a search warrant and I think he asked Johnson to read the warrant. Johnson said he wasn't serving a warrant. I pushed Ehrett in the nose. When I told Rossi to go down stairs, the agents were scattered all over the basement, which is about twenty-four feet square.

Q. Well, you said Pete said, "Let's fix this up," and so did Agents Johnson and Wheeler.

A. I could not hear, but I took it as if he did. He didn't offer us anything, Rossi didn't do anything but stand
33 there. Rossi said this would be the second still he was caught at and he could not stand to have two against him and wanted to fix it up. Agent Wheeler might have told Ehrett to shut the burner off. I don't recall any agent tell him that. Ehrett went back into the basement at the direction of the agents. Ehrett said it wasn't his still.

A. E. WHEELER recalled as a witness, testified as follows:

Mr. Alexander: Mr. Dougherty requested this exhibit be produced. I will turn it over to him and tender Mr. Wheeler for further cross-examination.

Cross-Examination by Mr. Dougherty.

I remember that one of the agents told Ehrett to turn the burner off.

H. A. MOORE recalled as a witness, testified as follows:

Direct Examination by Mr. Stephens.

Defendant Ehrett said he lived on South Fourth Street, Pekin, Illinois—1115, I think; and defendant Rossi said he couldn't think where he lived; he thought it was on Prince Street, I think.

JOHN EDENS, JR.

JOHN EDENS, JR. testified as follows:

Examination by Mr. Stephens.

My name is John Edens, Jr. I am now and was for five years on September 1st, a mail carrier in the City of Pekin.
During September, 1929, I delivered letters to Peter
34 Rossi at 731 Prince Street. I never was directed that
I can remember, to deliver letters addressed to Peter Rossi to any other place. I never had any letters addressed to him and delivered to him returned. I know Pete Rossi. I have delivered all of his mail to that address.

Cross-Examination by Mr. Dougherty.

I can not say that I ever knew Peter Rossi prior to or during the month of September, 1929. I don't know whether

the letters were addressed to the Mr. Peter Rossi who is the defendant in this case.

(Motion to strike the testimony of the witness. Motion denied.)

Mr. Alexander: I would like to have the Court call as the Court's witness Mrs. Nellie Faux. The Government does not want to vouch for Mrs. Faux.

The Court: What is the ground?

Mr. Alexander: She is the woman who is alleged to have lived in this house, and we think her testimony would have a bearing upon it.

Mr. Dougherty: I suggest, if the Court please, that they make a preliminary showing before they do any such a thing as that.

Mr. Alexander: Well, I vouch that I can not stand back of all of Mrs. Faux' testimony.

Mr. Dougherty: That is not a proper showing, if the Court please. The Government can not make anyone the Court's witness and bring a witness on here, and say, "We want you to believe so much as is beneficial to our side of the case. This woman here is a perjurer and one who is liable to commit perjury, but if she will testify to suit us, she is fine; but if not we will disavow her." There is a legal way to make that showing, and I insist that the United States Attorney make that showing which is necessary under the law, before this Court will call anybody as the Government's witness. There is no showing that she is hostile to the Government, but just "We would rather that the Court would call her." Now, that is not fair and it is not proper.

Mr. Alexander: I will state that I have talked with Mrs. Faux, and I don't want to vouch for all of her testimony. I think she is a witness that the Court should hear and give such weight to her testimony as the Court feels it is entitled to, but as representing the Government I would not want to vouch for its correctness in all of its details,—after talking to her.

Mr. Dougherty: If the Court please, if I understand the duty of the United States Attorney or one of his assistants, it is merely to develop such facts as he can on the trial of a case.

Mr. Alexander: There is a very recent case on this in this circuit.

Mr. Dougherty: If you make a showing.

Mr. Alexander: Well, I think we have made the showing; if we have not, I think we will proceed to say that we can not make it. I think we have made all the showing that is necessary.

The Court: Bring her in.

36 Mr. Dougherty: I want the record to show a strenuous objection.

The Court: Defendants object to the witness being called as the Court's witness. for the reason that no proper foundation has been laid and no proper showing made in the statement of counsel for the Government that the Government does not wish to vouch for the witness' testimony and reserves the right to impeach her if necessary and proper in the judgment of counsel, and asks that privilege; and for the purpose of not waiving the privilege or making that showing he requests the Court to call the witness as the Court's witness without prejudice to the prosecution. Does that cover it? What else should be shown?

Mr. Dougherty: I am not going to make any suggestion; at the last term of court you let them re-open a case on me.

The Court: Call the witness.

.(To which ruling of the Court the defendants, by their counsel, then and there duly excepted.)

MRS. ADOLPH FAUX, a witness called by the Court, having been sworn, was examined by the Court, and testified as follows,

My name is Mrs. Adolph Faux. On or about the 10th day of September. 1929, I lived on South Fifth Street. I don't recall the number; I think it is 1015. I recall the occasion of the officers making a raid in the basement about that time. I was at home at that time, and had lived there about nine months. I rented the property from Mr. Velde, and paid

37 thirty dollars a month rent. My family consists of my husband and one six-year old son. There are five rooms and a bath in that house, all on one floor. I rented the entire house; there was nobody else in it when I rented it. At that time there was a stairway leading down from the upstairs to the basement on the inside. Steps were in there at that time. I don't remember the exact date I rented the basement, but at the time I rented it, the steps were taken out

immediately. There was no understanding to take the steps out at the time I rented the basement.

(The witness here changes her testimony and says she guesses there was an understanding.)

When the basement was rented, the door leading to the kitchen into the stairway was padlocked and nailed up so that I could not use it. I rented the whole basement and the stairway. There was no ceiling in the stairway; above was the attic. There was no ceiling over the attic. I think I rented the basement about a week and a half before the raid to Mr. John Smith, of Pekin. I have seen him once in a while before I rented it to him for One Hundred Dollars a month. We had no understanding. He made one payment. I never saw anyone bringing in copper kettles and pipes and a gasoline stove because I stayed there only once in a while, and during the day I was down at my father's, at 701 Prince Street.

John Smith is kind of stout and short. He has no mustache nor whiskers and does not wear glasses. I should judges he weights about a hundred and eighty and I judge he is about middle age. I don't know what he does. I
38 was kind of shocked when he said he would pay me one hundred dollars a month for the basement. I did not ask him what he wanted to do with it. I wasn't really concerned because I didn't intend to stay there very long; and I was having a little trouble with my husband, and I separated from him, so I didn't pay so much attention like I should have. I was only there when I went to get a clean apron or something like that. Once in a while I would stay there. I would go down to my mother-in-law's once in a while to try to get hold of my husband. We have gone back together again and live on South Second Street.

I think it was two or three weeks after I separated from my husband that I rented the basement. My husband had gone before I rented the basement. He is a coal miner. I didn't hear them hammering around there or knocking upon the pipes or anything of that kind. I had no idea what was in the basement. I reserved the whole house for myself except what I had rented to John Smith.

I know Peter Rossi when I see him. He is the short man in the gray suit with black hair. I know the man sitting next to him but not to speak to him. I never saw Rossi or the other man around there. I don't know what Rossi's business is. I don't know if he is a plumber. I don't know

whether or not he was ever in the garage business. I think Mr. Ehrett has some relation in the garage business. I think there is an Ehrett Garage.

I didn't live there very long after the raid because my basement was a wreck, and there was a lot of odor around there. I went back to my husband a couple of days after the raid. He had nothing to do with renting the basement
39 to John Smith. I rented the house from Mr. Velde in the first place and was attending to that part of the business myself. I never saw anybody taking anything away from this place before the raid and never saw any trucks drive up there to deliver anything or take anything away at all. I was only there one evening and had company that night, and I never heard anything that night and never smelled anything like cooking mash or anything of that kind. The day of the raid the prohibition agents demanded that I let them in my room. They said they would force their way in. I did not invite them in at all and did not say "Come in and sit down." They did come in. I did not have anything there that I was ashamed of or afraid of. They said I had a man in my room, and I said I never. And they said if they didn't find a man in there they would get right out, and I insisted that I never, but they said I better, and I let them in. I don't know what man they were looking for; they just said a man.

Cross-Examination by Mr. Alexander.

I never did meet John Smith. I just seen him on the street the day I rented the basement, about a week and a half before the raid. I was down stairs doing my laundry and he came to the house and I had a talk with him. I had seen him on the street before about two times, but I didn't know exactly who he was. He said he would be interested to rent my basement.

40 After the raid, there was four or five agents came to my door. I don't remember who they were. I did not not say on that occasion that I had rented the basement to a man by the name of John Rust. I said John Smith. I said I thought this man was one of the Russo's. I never thought whether John Smith was this man's true name or not. I took it there was an understanding I was to stay out of the basement. He was to pay the electric and water bills.

On the day of the raid, I went to the house real early to get some clean clothes. I had stayed in the house one night after this man had rented the basement so far as I can recall. I did not invite Peter Rossi there that day. He was not a guest of mine there on that day nor was Edward Ehrett. Between the day I rented the basement and the day the raid occurred, I do not recall authorizing anyone to live in my rooms in that house. I didn't tell anyone to live there.

Q. You didn't authorize Mr. Rossi to live there?

A. I did? I didn't tell anyone that they could live there; to my knowledge there was no one stayed in those rooms.

Cross-Examination by Mr. Dougherty.

I had a radio in the house. I do not remember of Ehrett doing any work on it. I think I said to him the morning of the raid, "I know my radio is not working this morning." The radio was not working right. I suppose my husband got the radio from Ehrett. On the morning of the raid I remember somebody said "What is the matter with the radio?" and I said "The radio is not working," or something of that order.

41 *Further Cross-Examination by Mr. Alexander.*

That voice came from down stairs in the basement. I don't remember of anyone coming to the front door that morning and inquiring about the radio. A person could not get up from the basement into my part of the house. I hadn't seen Ehrett or Rossi that day, and did not recognize the voice that hollered upstairs about the radio and do not know who it was.

Government Rests.

Defendants renew Motion to Suppress Evidence. Motion denied.

EVIDENCE ON BEHALF OF THE DEFENDANTS.

ADOLPH FAUX, being first duly sworn, testified as follows:

My name is Adolph Faux, and I live at Pekin, Illinois. I am married; my wife's name is Nellie. My wife resided, on the 10th day of September, 1929, in the 1500 block South Fifth Street at Number 1516 South Fifth Street. I had not been living with my wife for about two or three weeks prior to the 10th of September. I went back to those premises the next morning after the raid. I am acquainted with the basement and the first floor of those premises, and made repairs upon the premises shortly after the 10th of September by replacing the basement where the concrete was broken.

On the 11th of September, 1929, you would go from the
42 first floor to the basement through the door in the kitchen down the stairway. There was a stairway on the morning of the 11th. There was no evidence of nail holes in the door on the morning of the 11th, as I opened the door and went right down the steps. I could not, from an examination of the door, see whether there were any nail holes in it. The furnace that heats the house sits about the middle of the basement. The furnace was there on the morning of the 11th. The gas meter of the house stood in the northwest corner of the basement. You burn coal in that furnace, but I never lived there in the winter time to burn any.

I have known Ed Ehrett, one of the defendants in this case, since I was a little boy. I bought a radio from him—a battery set—and took it home. And in the latter part of August, 1929, I asked Ehrett to go out and fix it, and he told me he would, that when he got time he would go out there.

Cross-Examination by Mr. Alexander.

I am now living on South Second Street in Pekin, and am employed as a coal miner. I was so employed on September 10th, 1930. I worked in the mine during the whole of September, 1930. I left my wife some ten or twelve days before the raid. I worked in the mine from seven-thirty A. M. until four P. M.

On the day of the raid, I was living at my mother's house at 301 Catherine Street. I heard about the seizure the after-

noon that it occurred when I came from the mine. I went
43 over to my house around eight or nine o'clock the next morning. I found my wife there. I didn't do anything, just looked around, went up in the kitchen and went down in the basement from the inside of the kitchen, down the stairway. The kitchen door opens into the basement. When I opened the door I saw a big hole in there and a lot of cans down there. There wasn't anything extending up into the attic. I didn't see any big column extending up beyond the kitchen door, nor any pipes extending up beyond the kitchen door. There were no holes in the steps, but one step had been broken out.

When I got down in the basement, there was a lot of cans there, and the basement was broken up on the north side of th furnace. I have never seen a liquor still. There was no boiler in there. I did not see anything there that might have been a still. I do not know what was there the day before. The hole in the floor had not been there when I left there. I used to have a four-burner gas stove in the basement. It was there on the morning of the 11th, there was nothing on it.

I have known Ehrett eleven or twelve years and Rossi six or seven years. I never did have the radio going; that is the reason I asked him (Ehrett) to come out and fix it. That was just around the time I left my wife, and I didn't hear anything further from him after that.

Redirect Examination by Mr. Dougherty.

One of the steps going down the stairway, the one about the middle, was broken out. It was just hanging down.

44 A. E. WHEELER, called on behalf of the defendants, testified as follows:

Examination by Mr. Dougherty.

I am the same A. E. Wheeler who testified on behalf of the Goernment yesterday. When I entered the premises located at 1516 South Fifth Street, in the City of Pekin, Illinois, on the 10th day of September, and immediately prior to that time, I did not know whether there was a stairway going from the first floor into the basement, and I did not know

whether any door was nailed between the first floor and the basement before I went on those premises.

The Government stipulates that neither Agent Wheeler, Agent Moore nor Agent Johnson knew that any stairway had been removed from the first floor to the basement of the premises at 1516 South Fifth Street, in the City of Pekin, and that neither of them knew that any door had been locked or closed or nailed causing a separation from the basement, of that premises, prior to the time that they entered the premises.

Defendants offer Transcript of Proceedings before the Commissioner, showing that on September 10th, 1929, Peter Rossi, Edward Ehrett and Nellie L. Faux were charged with a violation of Section 3 of Title 2 of the National Prohibition Act, and that they did unlawfully manufacture, possess and sell intoxicating liquor for beverage purposes and did maintain a common nuisance.

45 Defendants rest.

The Court find the defendants and each of them guilty.

Thereafter, on to-wit, November 28, A. D. 1930, there was filed with the Clerk of this Court by the defendants Rossi and Ehrett herein, their Motion for a New Trial, which said Motion is in the words and figures as follows, to-wit:

* * (Caption) * *

MOTION FOR NEW TRIAL.

Now comes the defendant, Peter Rossi, and the defendant Edward Ehrett, and each moves the Court to grant him a new trial herein for the following reasons:

1. There is no evidence in the case that either proves
46 or tends to prove that he committed any of the acts alleged or set forth in the indictment or any count thereof.

2. In arriving at a finding herein, the Court considered testimony and heard evidence obtained in violation of the defendats' rights uder the Constitution and Laws of the United States.

3. Because the indictment herein fails to charge a crime denounced by the laws of the United States.

4. Because the Court called the witness, Nellie Faux, as

a Court witness over the objection of these defendants, and in the absence of a proper showing by the United States Attorney.

Wherefore, these defendants pray that the Court set aside the verdict and grant a new trial.

PETER ROSSI
EDWARD EHRETT

By:
JOHN E. DOUGHERTY
Their Attorney.

But the Court, having duly considered said Motion for a New Trial, and being fully advised in the premises, denied the same.

(To which ruling of the Court, the Defendants by their counsel, then and there duly excepted.)

Thereafter, on to-wit, November 28, A. D. 1930, there was filed with the Clerk of this Court by the defendants Rossi and Ehrett herein, their Motion in Arrest of Judgment, which
47 said Motion is in the words and figures as follows, to-wit:

* * (Caption) * *

MOTION OF DEFENDANTS TO ARREST JUDGMENT.

The defendants, Peter Rossi and Edward Ehrett come now and move the Court to arrest judgment in this case and that they be discharged from the indictment for the following reasons:

1. It was error for the Court to overrule the Petition of the defendants filed herein to suppress evidence, and in permitting the Government to make proof of the evidence obtained by the illegal search and seizure.
2. The indictment and each count thereof fails to state any offense against the laws of the United States.
3. The indictment and each count thereof is drawn under statutes of the United States that had been and were repealed at the time of the Commission of the alleged offense, and
48 are directly in conflict with the National Prohibition Act, whereby they were not reenacted by the Act of Congress of November 23rd, 1921. Wherefore, the Court does not have jurisdiction of the subject matter.

Wherefore, the defendants and each of them respectfully pray that the judgment and sentence may be arrested in this case and that they go hence without day.

PETER ROSSI
EDWARD EHRETT

By:
JOHN E. DOUGHERTY,
Their Attorney.

But the Court, having heard the arguments of counsel and having duly considered said motion, and being fully advised in the premises, denied the same, and entered judgment upon the verdict.

(To which ruling of the Court and entry of Judgment, the defendants, and each of them, by their counsel, then and there duly excepted.)

49 And Now in furtherance of justice, and that right may be done, and forasmuch as the matters and things hereinbefore set forth do not otherwise appear of record, the defendants tender and present the foregoing as their Bill of Exceptions in this case to the action of the Court, and pray that the same may be settled, allowed and signed and sealed by the Court, and made a part of the record,

And the Same Is Accordingly Done this 12th day of June, A. D. 1931.

LOUIS FITZHENRY,
Judge.

O. K.
MARKS ALEXANDER,
Asst. U. S. Atty.

Filed June 12, 1931, S. T. Burnett, Clerk.

50 And afterwards, to wit: on the 19th day of December, A. D. 1930, there was filed in the office of the clerk of said court, in said cause, a certain notice of appeal, petition for appeal, and assignment of errors, all of which are in words and figures, following, to wit:

51 * * (Caption) * *

NOTICE OF APPEAL.

To the Honorable Walter M. Provine, United States District Attorney for the Southern District of Illinois:

Please take notice that the above named defendants, Peter Rossi and Edward Ehrett, have prayed an appeal from the United States District Court for the Southern District of Illinois, Northern Division, to the United States Circuit Court of Appeals for the Seventh Judicial Circuit.

Dated at Peoria, Illinois, in the Southern District of Illinois, this 19th day of December, A. D. 1930.

PETER ROSSI
EDWARD EHRETT

By
JOHN E. DOUGHERTY
Attorney for Defendants.

Received a true copy of the above notice this 19th day of December, A. D. 1930.

WALTER M. PROVINE
United States Attorney.
By MARKS ALEXANDER
Asst. U. S. Atty.

Endorsed: Filed Dec. 19, 1930 S. T. Burnett, Clerk.

52 * * (Caption) * *

PETITION FOR APPEAL.

To the Honorable Louis FitzHenry, Judge of the District Court of the United States for the Southern District of Illinois:

The above named Peter Rossi and Edward Ehrett each feeling himself aggrieved by the orders and decree of this Honorable Court, rendered and entered in the above entitled cause on the 18th day of December, A. D. 1930, does hereby ask the Honorable Court for an appeal to the Circuit Court of Appeals for the Seventh Judicial Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and the

said defendants pray that their appeal be allowed and that citation be issued as provided by law, and that transcript of record, proceedings and documents upon which said orders, decrees and judgment was based duly authenticated, be sent to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, at Chicago, Illinois, under the rules of such Court in such case made and provided, and that said appeal may be made a supersedeas, and that your petitioners be released on bail in amount to be fixed as this Court shall deem reasonable and just, pending the final disposition of this appeal.

PETER ROSSI
EDWARD EHRETT

53 By: JOHN E. DOUGHERTY
Attorney for Defendants.

Service of the within Petition for Appeal, together with Assignment of Errors and Notice of Appeal is hereby acknowledged and accept this 19th day of December, A. D. 1930.

WALTER M. PROVINE
United States Attorney.
By MARKS ALEXANDER
Asst. U. S. Atty.

54 * * (Caption) * *

ASSIGNMENT OF ERRORS.

Now come the defendants, Peter Rossi and Edward Ehrett, and file the following Assignment of Errors upon which they will rely upon their prosecution of the appeal in the above mentioned cause from the orders and judgment of this Honorable Court, entered on the 18th day of December, A. D. 1930.

1. The United States District Court for the Southern Distric of Illinois erred in overruling and denying the defendants Motion in Arrest of Judgment and entering judgment against them in this case.

2. The District Court erred in overruling and denying the Petition of the defendants to suppress evidence, and in permitting the Government to make proof of the illegal search and seizure.

3. The indictment and each count thereof fails to state
55 any offense against the laws of the United States.

4. The indictment and each count thereof fails to furnish the accused with such a description of the charges against them as will enable them to plead former jeopardy.

5. The indictment and each count thereof fails to set forth the alleged acts of the defendants with reasonable particularity of time, place and circumstance.

6. There is no such substance or thing known to the Internal Revenue Laws of the United States as moonshine whiskey and hootch.

7. There is no evidence in the Record to show that any offense was committed in the Eighth Internal Revenue Collection District of Illinois, or in the Thirteenth Prohibition District of the United States.

8. There is no evidence in the Record that shows to the Court that the alleged still was not registered with the Prohibition Administrator of the Thirteenth Prohibition District of the United States, or that a bond with at least two sureties had not been executed and approved by the Prohibition Administrator of the Thirteenth Prohibition District of the United States, in manner and form as provided by law.

9. There is no evidence in the Record that shows that these defendants were persons who were required to register the alleged still, or execute a bond herein.

10. The evidence wholly and entirely fails to show that these defendants or either of them is guilty in manner and form as charged in the indictment.

11. The indictment and each count thereof is drawn
56 under statutes of the United States that had been and were repealed at the time of the commission of the alleged offense, and were directly in conflict with the Act of Congress of October 28th, 1919, commonly known as the National Prohibition Act, whereby they were not reenacted by the Act of Congress of November 23rd, 1921, commonly known as the Willis-Campbell Act, and the Court therefore does not have jurisdiction of the subject matter herein.

PETER ROSSI
EDWARD EHRETT

By: JOHN E. DOUGHERTY
Attorney for Defendants.

Filed Dec. 19, 1930. S. T. Burnett, Clerk.

57 And afterwards, to wit: on the 23rd day of December, A. D. 1930, the following further proceedings were had in said court in said case and were entered of record to wit:

58 * * (Caption) * *

ORDER ALLOWING APPEAL AND SUPERSEDEAS AND FIXING AMOUNT OF SUPERSEDEAS BOND.

This cause again having come on to be heard upon the petition of the defendants, Peter Rossi and Edward Ehrett, for an appeal herein, and it appearing that assignment of errors have been duly made and filed as required by law, it is ordered that appeal be and the same is allowed to the end that the judgment of this Court heretofore entered herein may be reviewed in the United States Circuit Court of Appeals for the Seventh Judicial Circuit, and that the amount of bond to be given by the defendants on account thereof and as a supersedeas herein, shall be and is fixed in the sum of Five Thousand ($5000.00) Dollars each.

Dated at Peoria, Illinois, this 19th day of December, A. D. 1930.

LOUIS FITZHENRY,
Judge.

Endorsed:Filed Dec. 23, 1930. S. T. Burnett, Clerk.

23. 59 And afterwards, to wit: on the 23rd day of December, A. D. 1930, there was filed in the office of the clerk of said court, a certain bond on appeal by the defendant Peter Rossi, which said bond was and is in the words and figures, following, to wit:

60 * * (Caption) * *

BAIL BOND ON APPEAL.

Know All Men By These Presents:

That we, Peter Rossi as principal, and Elizabeth Wexler and Herman Pogioli, as sureties, are held and firmly bound unto the United States of America in the penal sum of Five Thousand ($5000.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors

and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of December, in the year of our Lord One Thousand Nine Hundred and Thirty.

The condition of this obligation is such that whereas, on the 18th day of December, A. D. 1930, by the consideration of the District Court of the said United States, for the Southern District of Illinois, Northern Division, in a certain criminal cause, to-wit, a criminal indictment against the above named defendants, charging a violation of the Internal Revenue Laws of the United States of America, being Criminal Case No. 1272 in this Court, the said defendants, Peter Rossi and Edward Ehrett were adjudged and sentenced to pay a fine of Fifteen Hundred Dollars, and sentenced to Three years imprisonment in the United States Penitentiary at Leavenworth, Kansas; and whereas, upon petition of the said Peter Rossi and the said Edward Ehrett, the Honorable Louis FitzHenry, Judge of the District Court of the United States for the Southern District of Illinois, Northern Division, at Peoria, Illinois, within said District, has allowed an appeal from the aforesaid District Court to the United States Circuit Court of Appeals, for the Seventh Judicial Circuit,

61 from said judgment and sentence, and has made said appeal a supersedeas, and that the said Peter Rossi be admitted to bail in that behalf in the sum of Five Thousand ($5000) Dollars above mentioned.

Now, if the said Peter Rossi shall personally be and appear before the said United States Circuit Court of Appeals in and for the Seventh Judicial Circuit, on the first day of the next regular term thereof, and from day to day a thereafter during that and subsequent terms until the termination of said appeal, and shall not, at any of the terms of said Court depart that Court without leave thereof, and shall, in case the judgment and sentence aforesaid is affirmed, or in case his said appeal shall not be prosecuted with effect, surrender himself to the custody of the United States Marshal of the said United States of America in and for the Southern District of Illinois, then this obligation to be void, otherwise to remain in full force and virtue.

PETER ROSSI (Seal)
ELIZABETH WEXLER (Seal)
HERMAN POGIOLI (Seal)

Approved:
FITZHENRY,
Judge.

62 United States of America,
State of Illinois, } ss.
Peoria County.

ELIZABETH WEXLER, a surety on the annexed recognizance, being first duly sworn, deposes and says that she resides at 107 N. Park Place, in the City of Peoria, Illinois, in said District; that she is a free-holder in the County of Peoria, Illinois; and that she is worth the sum of Eleven Thousand Dollars, over and above all her just debts and liabilities in property subject to execution and sale, and that her property consists of real property as follows: West 16-2/3 feet of Lot 2 and East 16-2/3 feet of Lot 3 in Block 57 Monson & Sanfords Addition to Peoria, Illinois being a two story frame dwelling and East One Half of South One Half Lot 4 Block 57 Monson & Sanford's Addition to the City of Peoria Illinois being a two storey frame dwelling. No Encumbrances on either property.

ELIZABETH WEXLER.

Subscribed and sworn to before me this 20th day of December, A. D. 1930.

EVA LAMKIN,
(Seal) *Notary Public.*

63 United States of America,
State of Illinois, } ss.
Peoria County.

HERMAN POGIOLI, a surety on the annexed recognizance, being first duly sworn, deposes and says that he resides at 1529 Charlotte Street, in the City of Pekin, Illinois, in said District; that he is a free-holder in the County of Tazewell, Illinois; and that he is worth the sum of Fourteen Thousand Dollars, over and above all his just debts and liabilities in property subject to execution and sale, and that his property consists of real property as follows: One story brick & tile residence located on the East forty feet of Lot 8 Block 5 Millers Addition to the City of Pekin Illinois; and East 40 feet Block 2 and East 40 feet Lot 5 Block 2 and East 40 feet Lot 6 Block 2 and East 40 feet Lot 7 Block 2 and East forty feet Lot 4 Block 5 and East 40 feet Lot 5 Block 5 and East 40 feet Lot 6 Block 5 and East 40 feet Lot 7 Block 5 and East

40 feet Lot 9 Block 5 Millers Addition to Pekin, Illinois. Encumbrance of Four Hundred Dollars.

HERMAN POGIOLI.

Subscribed and sworn to before me this 20th day of December, A. D. 1930.

(Seal)

EVA LAMKIN,
Notary Public.

64 United States of America,
State of Illinois,
Peoria County. } ss.

....., a surety on the annexed recognizance, being first duly sworn, deposes and says that ..... resides at ..... Street, in the County of ..... Illinois, in said District; that ..... is a free-holder in the County of ..... Illinois; and that ..... is worth the sum of ..... Dollars, over and above all ..... just debts and liabilities in property subject to execution and sale, and that ..... property consists of real property as follows: .....

.....

Subscribed and sworn to before me this ..... day of December, A. D. 1930.

.....

Notary Public.

65 United States of America.
State of Illinois,
Peoria County. } ss.

....., a surety on the annexed recognizance, being first duly sworn, deposes and says that ..... resides at ....., in the County of ..... Illinois, in said District; that ..... is a free-holder in the County of ..... Illinois; and that ..... is worth the sum of ..... Dollars, over and above all ..... just debts and liabilities in property subject to execution and sale, and that ..... property consists of real property as follows: .....

.....

Subscribed and sworn to before me this ..... day of December, A. D. 1930.

.....

Notary Public.

Endorsed: Filed Dec 23, 1930 S. T. Burnett, Clerk.

66 And afterwards, to wit: on the 23rd day of December, A. D. 1930, there was filed in the office of the clerk of said court, in said cause, a certain bond of appeal by the defendant Edward Ehrett, which said Bond was and is in the words and figures following, to wit:

67 * * (Caption) * *

BAIL BOND ON APPEAL.

Know All Men By These Presents:

That we, Edward Ehrett as principal, and William Ehrett, Sr., as sureties, are held and firmly bound unto the United States of America in the penal sum of Five Thousand ($5000.00) Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our teals and dated this 23rd day of December, in the year of our Lord One Thousand Nine Hundred and Thirty.

The condition of this obligation is such that whereas, on the 18th day of December, A. D. 1930, by the consideration of the District Court of the said United States, for the Southern District of Illinois, Northern Division, in a certain criminal cause, to-wit, a criminal indictment against the above named defendants, charging a violation of the Internal Revenue Laws of the United States of America, being Criminal Case No. 1272 in this Court, the said defendants, Peter Rossi and Edward Ehrett were adjudged and sentenced to pay a fine of Fifteen Hundred Dollars. and sentenced to Three years imprisonment in the United States Penitentiary at Leavenworth, Kansas; and whereas, upon petition of the said Edward Ehrett and the said Peter Rossi, the Honorable Louis FitzHenry, Judge of the District Court of the United States for the Southern District of Illinois, Northern Division, at Peoria, Illinois, within said District, has allowed an

appeal from the aforesaid District Court to the United States Circuit Court of Appeals, for the Seventh Judicial Circuit, from said judgment and sentence, and has made said appeal a supersedeas, and that the said Edward Ehrett be ad-
68 mitted to bail in that behalf in the sum of Five Thousand ($5000) Dollars above mentioned.

Now, if the said Edward Ehrett shall personally be and appear before the said United States Circuit Court of Appeals in and for the Seventh Judicial Circuit, on the first day of the next regular term thereof, and from day to day thereafter during that and subsequent terms until the termination of said appeal, and shall not, at any of the terms of said Court depart that Court without leave thereof, and shall, in case the judgment and sentence aforesaid is affirmed, or in case his said appeal shall not be prosecuted with effect, surrender himself to the custody of the United States Marshal of the said United States of America in and for the Southern District of Illinois, then this obligation to be void, otherwise to remain in full force and virtue.

EDWARD EHRETT (Seal)
WILLIAM EHRETT, SR. (Seal)

Approved:
FITZHENRY,
Judge.

69 United States of America,
State of Illinois,
Peoria County. } ss.

WILLIAM EHRETT, SR., a surety on the annexed recognizance, being first duly sworn, deposes and says that he resides at 221 Ann Street, in the Village of East Peoria, Illinois, in said District; that he is a free-holder in the County of Tazewell, Illinois; and that he is worth the sum of Forty Four Thousand Dollars, over and above all his just debts and liabilities in property subject to execution and sale, and that his property consists of real property as follows: South ½ of North East Quarter Section Twelve Twp 25 North Range 5 West 3rd P. M. being 72 acres of building lots worth forty thousand dollars and South ½ North West Quarter Fractional Section 12 Twp 25 North Range 5 West Third PM being 27 acres of land worth $4200.00 No Encumbrances.

WILLIAM EHRETT, SR.

Subscribed and sworn to before me this 20th day of December, A. D. 1930.

EVA LAMKIN,

(Seal) *Notary Public.*

70 United States of America
State of Illinois,
Peoria County. } ss.

....., a surety on the annexed recognizance, being first duly sworn, deposes and says that ..... resides at .....Street, in the County of ....., Illinois, in said District; that ..... is a free-holder in the County of ..... Illinois; and that ..... is worth the sum of ..... Dollars, over and above all ..... just debts and liabilities in property subject to execution and sale, and that ..... property consists of real property as follows: .....

.....

Subscribed and sworn to before me this ..... day of December, A. D. 1930.

.....

Notary Public.

71 United States of America,
State of Illinois,
Peoria County. } ss.

....., a surety on the annexed recognizance, being first duly sworn, deposes and says that ..... resides at ..... Street, in the County of ....., Illinois, in said District; that ..... is a free-holder in the County of..... Illinois; and that ..... is worth the sum of..... Dollars, over and above all ..... just debts and liabilities in property subject to execution and sale, and that ..... property consists of real property as follows: .....

.....

Subscribed and sworn to before me this ..... day of December, A. D. 1930.

.....

Notary Public.

72 United States of America,
State of Illinois,
Peoria County. } ss.

....., a surety on the annexed recognizance, being first duly sworn, deposes and says that ..... resides at ..... Street, in the County of ....., Illinois, in said District; that ..... is a free-holder in the County of ..... Illinois; and that ..... is worth the sum of ..... Dollars, over and above all ..... just debts and liabilities in property subject to execution and sale, and that ..... property consists of real property as follows: .....

.....

Subscribed and sworn to before me this ..... day of December, A. D. 1930.

.....

Notary Public.

Endorsed: Filed Dec. 23, 1930, S. T. Burnett, Clerk.

73 And afterwards, to wit: on the 20th day of January, A. D. 1931, the following further proceedings were had in said court in said case and were entered of record, to wit:

* * (Caption) * *

Come now the defendant herein by John E. Dougherty, Esq., their attorney and for good cause shown, it is ordered by the court that the time for preparing and filing bill of exceptions herein and for preparing and filing transcript of record and for docketing said case in the United States Circuit Court of Appeals for the Seventh Circuit be, and is hereby extended for a period of thirty days from and after January 22nd, A. D. 1931, to and including February 21st, A. D. 1931.

Enter:

(Signed) FITZHENRY,
U. S. District Judge.

Endorsed: Filed January 30, 1931, S. T. Burnett, Clerk.

74 And afterwards, to wit: on the 19th day of February, A. D. 1931, the following further proceedings were had in said court in said case and were entered of record to wit:

* * (Caption) * *

Now again come the defendants herein, by John E. Dougherty, their attorney, and for good cause shown, it is ordered by the Court that the time for preparing and filing the bill of exceptions herein, and for preparing and filing transcript of record and for docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit, be, and is hereby extended for a period of thirty days from and after February 21st, 1931 to and including March 23rd, 1931.

Done at Peoria, Illinois this 19th day of February, 1931.

LOUIS FITZHENRY,
United States District Judge.

Endorsed: Filed Feb. 19, 1931, S. T. Burnett, Clerk.

75 And afterwards, to wit: on the 19th day of March, A. D. 1931, the following further proceedings were had in said court in said case and were entered of record, to wit:

* * (Caption) * *

And now again come the defendants herein, by John E. Dougherty, their attorney, and for good cause shown, it is ordered by the Court that the time for preparing and filing the Bill of Exceptions herein, and for preparing and filing transcript of record and for docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit, by, and is hereby extended for a period of thirty days from and after March 23, 1931, to and including April 22, 1931.

FITZHENRY,
Judge.

Endorsed: Filed Mar 19, 1931, S. T. Burnett, Clerk.

76 And afterwards, to wit: on the 21st day of April, A. D. 1931 the following further proceedings were had in said court in said case and were entered of record, to wit: Ent 21

* * (Caption) * *

ORDER.

Now again come the defendants herein, by John E. Dougherty, their attorney, and for good cause shown, it is ordered by the Court that the time for preparing and filing the bill of exceptions herein, and for preparing and filing transcript of record and for docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit, be, and is, hereby extended for a period of thirty days from and after April 22nd, 1931, to and including May 22nd, 1931.

Done at Peoria, Illinois, this 21st day of April, 1931.

LOUIS FITZHENRY,
United States District Judge.

Endorsed: Filed Apr. 21, 1931.

S. T. BURNETT,
Clerk.

77 (Endorsed) No. 1272 United States District Court Southern District of Illinois Northern Division United States of America, Plaintiff, vs. Peter Rossi, Edward Ehrett, Defendants. Order John E. Doughterty 332 Peoria Life Building Peoria, Illinois Attorney for Defendants.

78 And afterwards, to wit: on the 21st day of May, A. D. 1931, the following further proceedings were had in said court in said case and were entered of record, to wit: Entere 21, 1

* * (Caption) * *

ORDER.

Now again come the defendants herein, by John E. Dougherty, their attorney, and for good cause shown, it is ordered by the Court that the time for preparing and filing the bill of exceptions herein, and for preparing and filing transcript of record and for docketing said cause in the United States

Circuit Court of Appeals for the Seventh Circuit, be and is, hereby extended for a period of thirty days from and after May 22nd, 1931, to and including June 21st, 1931.

Done at Peoria, Illinois, this 21st day of May, 1931.

LOUIS FITZHENRY,
United States District Judge.

Ok

MARKS ALEXANDER,
Asst. U. S. Atty.

Endorsed: Filed May 21, 1931, S. T. Burnett.

79 And afterwards, to wit: on the 20th day of June, A. D. 1931, the following further proceedings were had in said court in said case and were entered of record, to wit:

* * (Caption) * *

ORDER.

Now again come the defendants herein, by John E. Dougherty, their attorney, and for good cause shown, it is ordered by the court that the time for preparing and filing transcript of record on appeal and docketing said cause in the United States Circuit Court of Appeals for the Seventh Circuit, be, and is hereby extended for a period of twenty days from and after June 21, 1931, to and including July 11, 1931.

Done at Peoria, Illinois, this 20th day of June, A. D. 1931.

Enter:

(Signed) LOUIS FITZHENRY,
U. S. District Judge.

OK

MARKS ALEXANDER,
Asst. U. S. Attorney.

Indorsed, filed June 20, 1931, S. T. Burnett, Clerk.

80 And afterwards, to wit: on the 19th day of January, A. D. 1931, there was filed in the office of the clerk of the said court, a certain Praecipe for Record, which said Praecipe was and is in the words and figures, following, to wit:

81 • • (Caption) • • Filed 19

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of said Court:

Please prepare Transcript of Record on appeal to the Circuit Court of Appeals for the Seventh Judicial Circuit in behalf of Peter Rossi and Edward Ehrett, the same to consist of the following:

1. Placita and Captions.
2. Indictment.
3. Petitions to Suppress Evidence and ruling of the Court thereon.
4. Plea of not guilty, trial, finding, verdict, Motion for New trial, Motion in Arrest of Judgment, judgment and sentence of the Court, and any and all orders of the Court in relation thereto.
5. Bill of Exceptions.

82 6. Petition for Appeal.
7. Assignment of Errors.
8. Order Allowing Appeal and Supersedeas.
9. Appeal and Clerk's Return.
10. Citation and Acceptance of Service.
11. Praecipe for Transcript of Record
12. Supersedeas Bond.
13. Clerk's Return.

PETER ROSSI,
EDWARD EHRETT.

By:
JOHN E. DOUGHERTY,
Their Attorney.

Endorsed: Filed Jan 19 1931 S. T. Burnett, Clerk

85 United States of America
Southern District of Illinois } ss:
Northern Division

I, S. T. Burnett, Clerk of the District Court of the United States for the Southern District of Illinois and keeper of the records and seals thereof, od hereby certify the foregoing to be a true copy and complete transcript of the proceedings had

of record and on file in the case entitled The United States vs. Peter Rossi, alias Peter Russo and Edward Ehrett, No. 1272, made in accordance with praecipe for record filed herein, as fully as the same appear from the original files and record in said cause now in my office remaining.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Peoria, in said District, this 22nd day of June, A. D. 1931.

(Seal) S. T. BURNETT, *Clerk*

83 * * (Caption) * *

CITATION AND ACCEPTANCE OF SERVICE.

To the United States of America—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Seventh Judicial Circuit, at Chicago, Illinois, thirty days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Southern District of Illinois, Northern District wherein Peter Rossi and Edward Ehrett are the Appellants and you are the Appellee, to show cause, if any there be, why the judgment rendered against the said Appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Judge of the District Court of
84 the United States for the Southern District of Illinois, Northern Division, this 23rd day of December, A. D. 1930.

LOUIS FITZHENRY,
United States District Judge,
Southern District of Illinois.

Service accepted this 23rd day of December A. D. 1930.

UNITED STATES OF AMERICA,
Appellee.
By WALTER M. PROVINE,
United States Attorney.
By ROBERT A. STEPHENS, JR.,
Assistant United States Attorney.

Filed Dec. 23, 1930, S. T. Burnett, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby cerify that the foregoing printed pages, numbered from 1 to 48, inclusive, contain a true copy of the Printed Record, printed under my supervision and filed on the twenty-eight day of July, 1931, on which the following entitled cause was heard and determined: Peter Rossi and Edward Ehrett, Appellants, vs. The United States of America, Appellee, No. 4594, October Term, 1931, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-second day of December, A. D. 1932.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

At the regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit on the seventh day of October, 1930, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty, and of our Independence the One Hundred and Fifty-Fifth.

And afterwards, to-wit: On the sixteenth day of July, 1931, there was filed in the Office of the Clerk of this Court, an Apeparance of Counsel for Appellee, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 4594 October Term, 1930

PETER ROSSI AND EDWARD EHRETT
vs.
THE UNITED STATES OF AMERICA

The Clerk will enter my appearance as counsel for appellee.

FRANK K. LEMON,
U. S. Attorney, Springfield, Illinois.

Endorsed: Filed, July 16, 1931. Edward M. Holloway, Clerk.

At the regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago, in the said Seventh Circuit, on the sixth day of October, 1931, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-One, and of our Independence the One Hundred and Fifty-Sixth.

And afterwards, to-wit: On the twelfth day of April, 1932, the following further proceedings were had and entered of record, to-wit: Tuesday, April 12, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding
Hon. Evan A. Evans, Circuit Judge
Hon. William M. Sparks, Circuit Judge
Frederick G. Campbell, Clerk
Henry C. W. Laubenheimer, Marshal

PETER ROSSI AND EDWARD EHRETT
No. 4594 vs.
THE UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on April 26, 1932.

And afterwards, to-wit: On the twenty-sixth day of April, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 26, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding
Hon. Evan A. Evans, Circuit Judge
Hon. William M. Sparks, Circuit Judge
Hon. James H. Wilkerson, District Judge
Frederick G. Campbell, Clerk
Henry C. W. Laubenheimer, Marshal

Before:

Hon. Samuel Alschuler, Circuit Judge
Hon. Evan A. Evans, Circuit Judge
Hon. James H. Wilkerson, District Judge

PETER ROSSI AND EDWARD EHRETT 4594 vs. THE UNITED STATES OF AMERICA	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

Now comes this day the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. John E. Dougherty, counsel for appellant, and Mr. Frank K. Lemon, counsel for Appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the thirtieth day of June, 1932, there was filed in the Office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 4594 October Term, April Session, 1932

PETER ROSSI AND EDWARD EHRETT Appellants vs. THE UNITED STATES OF AMERICA Appellee.	Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

June 30, 1932

Before Alschuler and Evans, Circuit Judges, and Wilkerson, District Judge.

Wilkerson, District Judge: The first two counts on which defendants were convicted charge violations of Section 306 of

Title 26, U. S. C. A. (R. S. 3281) by carrying on the business of a distiller with intent to defraud the United States of special tax on spirituous liquor. The third count charges a violation of Section 284 of Title 26, U. S. C. A. (R. S. 3260) by carrying on the business of a distiller without having given bond as required by law. The fourth count charges a violation of Section 281 of Title 26, U. S. C. A. (R. S. 3258) by having possession of distilling apparatus which had not been registered as required by law.

1. Appellants assert that the statutes upon which the indictment is based have been repealed. In United States v. Yuginovich, 256 U. S. 350, it was held that the National Prohibition Act repealed the sections of the internal revenue laws here involved. By this Willis-Campbell Act of November 23, 1921, c. 134, Sec. 5, 32 Stat. 223 (27 U. S. C. A., Sec. 3), it was provided:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title."

We think that the effect of the Willis-Campbell Act was to re-enact the provisions of the internal revenue laws relied upon by the Government in this case. Difficulties or even impossibilities in complying with the provisions of the revenue laws, thus re-enacted, do not establish that the intention of Congress was not to continue those provisions in force. There is no direct conflict between the prohibitory legislation and the provisions of the revenue laws here involved. (United States v. One Ford Coupe, 272 U. S. 321, 327; United States v. Stafoff, 260 U. S. 477; United States v. Sullivan, 274 U. S. 259; Murphy v. United States, 38 Fed. (2d) 441.)

2. It is urged as ground for reversal that the evidence which is relied upon to sustain the conviction should have been suppressed. The officers entered without a warrant and searched

the premises. Appellants invoke the statute as to the search of a private dwelling. The basement in which the still was found had been separated from the residence portion of the building on the floors above by nailing and padlocking the door at the head of the steps leading from the basement. The Court was warranted, in view of all the circumstances, in rejecting the claim that defendants were on the premises as guests engaged in repairing some radio apparatus. Defendants disclaimed any interest in any portion of the premises searched, and are not in position to assert a violation of their constitutional rights. And there is evidence to sustain the finding that defendants, in apparent charge of the premises, authorized the search and seizure without a warrant. (Milvonico v. United States, 53 Fed. 2d) 937.)

3. Error is assigned because of the failure of the prosecution to show that Pekin, Illinois, is in the collection district and prohibition district charged in the indictment. The Court takes judicial notice of this fact. (Hoyt v. Russell, 117 U. S. 401; United States v. Jackson, 104 U. S. 41; Caha v. United States, 152 U. S. 211.)

4. Error is assigned because of the absence of direct evidence in the record to show that the still was not registered or the bond approved as required by law. There are many circumstances shown in the record from which, unexplained, the Court was warranted in finding that there was no registration or bond. The fact of registration and giving bond was peculiarly within the knowledge of the defendants. In view of their conduct at the time of the search and their failure to make any explanation, the conclusion that they had failed to comply with the statute seems to be a logical one. (Cardenti, et al. v. United States, 24 Fed (2d) 782; McCurry, et al. v. United States, 221 Fed. 532; Barton, et al. v. United States, 267 Fed. 174.)

5. Other errors as to the sufficiency of the proof have been assigned, but we think that they are without merit and do not require further discussion.

The judgment is AFFIRMED.

And on the same day, to-wit: On the thirtieth day of June, 1932, the following further proceedings were had and entered of record, to-wit:

Thursday, June 30, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding
Hon. Evan A. Evans, Circuit Judge
Hon. William A. Sparks, Circuit Judge
Frederick G. Campbell, Clerk
Henry C. W. Laubenheimer, Marshal

Before:

Hon. Samuel Alschuler, Circuit Judge
Hon. Evan A. Evans, Circuit Judge
Hon. James H. Wilkerson, District Judge

PETER ROSSI AND EDWARD EHRETT
No. 4594 vs.
THE UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Northern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

And afterwards, to-wit: On the nineteenth day of July, 1932, there was filed in the Office of the Clerk of this Court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit on the fourth day of October, 1932, of the October Term, in the year of our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-Seventh.

And afterwards, to-wit: On the seventh day of October, 1932, the following further proceedings were had and entered of Record, to-wit:

Friday, October 7, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding
Hon. Evan A. Evans, Circuit Judge
Hon. William A. Sparks, Circuit Judge
Frederick G. Campbell, Clerk
Henry C. W. Laubenheimer, Marshal

Before:

Hon. Samuel Alschuler, Circuit Judge
Hon. Evan A. Evans, Circuit Judge
Hon. James H. Wilkerson, District Judge

PETER ROSSI AND EDWARD EHRETT
No. 4594 vs.
THE UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Southern District of Illinois, Northern Division

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 7, inclusive, contain a true copy of the proceedings had and papers filed (excepting the briefs of counsel and motions, stipulations and orders relating to the filing of briefs, and the Petition for Rehearing) in the case of Peter Rossi and Edward Ehrett v. The United States of America, No. 4594, October Term, 1931, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-second day of December, A. D. 1932.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 6, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, limited to the question of the sufficiency of the evidence to support conviction upon the third and fourth counts. The case is advanced and assigned for argument on Monday, March 13th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
JAN 4 1933
CHARLES ELMORE CROP
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932

PETER ROSSI and
EDWARD EHRETT,
Petitioners,
vs.
UNITED STATES OF
AMERICA,
Respondent

No. 594

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT

I. R. WASSON,
Attorney for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932

PETER ROSSI and
EDWARD EHRETT,
Petitioners,
vs.
UNITED STATES OF
AMERICA,
Respondent

No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, PETER ROSSI and EDWARD EHRETT, respectfully represent unto this Honorable Court that heretofore, to-wit, on the 6th day of November, A. D. 1930, that being one of the days of the October Term, A. D. 1930, of the District Court of the United States for the Northern Division of the Southern District of Illinois, the grand jury of said

Division and District returned into said Court an indictment against your petitioners. The indictment consisting of five counts, charging petitioners with having violated various internal revenue laws of the United States.

Count one (Rec., pp. 2-3)charges a violation of Title 26, Section 306, U. S. C. A. (R. S. 3281), in that they carried on the business of a distiller with intent to defraud the United States of the special tax of one dollar and ten cents ($1.10) on 120 gallons of spirituous liquor.

Count two (Rec., pp. 3-4) charges a violation of Title 26, Section 241, U. S. C. A. (R. S. 3247), in that they did engage in and carry on the business of a distiller, and engage in and carry on the business of separating 120 gallons of alcoholic spirits by the process of evaporizing fermented corn sugar mash, then and there intending to defraud the United States of the tax of one dollar and ten cents ($1.10).

Count three (Rec., pp. 4-5) charges a violation of Title 26, Section 284, U. S. C. A. (R. S. 3260), in that the appellants, at Pekin, Tazewell County, Illinois, in the Northern Division of the Southern District of Illinois, within the Eighth Internal Revenue Collection District of Illinois, and within the Thirteenth Prohibition District of the United States, did unlawfully, etc., carry on the business of a distiller without having given bond as required by law.

Count four (Rec., p. 6) charges a violation of Title 26, Section 281, U. S. C. A. (R. S. 3258), in that the appellants,

at the same place, on September 10, 1929, had in their possession a still and coil, etc., being attached to and used in connection with a condenser, boiler, etc., which still had not been registered with the Prohibition Administrator for the Thirteenth Prohibition District of the United States.

The facts out of which the above indictment grew are as follows:

On September 8th, 1929, prohibition agents went to the premises, the private dwelling of Adolph and Nellie Faux, located at 1516 South Fifth Street, in the City of Pekin, Illinois. The agents drove around the premises and they say they could smell fermenting mash and hear the buzz or hum of an electric pump in the basement. On September 10th, two days later, at about nine or ten o'clock in the morning, Federal prohibition agents again visited the premises; they drove up in front of the premises and stopped; they say they could smell the odor of alcohol, the cooking odor. They then went upon the premises and passing the house they looked in and saw a still and heard the pump of the oil burner. They saw no one attending the still. Then they walked to the back door and called "Hello" and in a short time a man appeared, who was later known as Ehrett. Agent Johnson asked Ehrett if he had a still down there and he said "No," and Ehrett came out and Agent Johnson said, "Do you care if I go down and look?" and he (Ehrett) started to leave, and he (Johnson) said, "No you are not going to leave; you are going back with us."

They then proceeded to search the premises without a

search warrant. In the attic of the premises they found Rossi, who said he was there fixing a radio. There was no evidence of any sales of intoxicating liquor from that residence. Timely motions to suppress the evidence were made. The petitioners claimed they were in said residence as guests and employees, and therefore entitled to the same constitutional rights as the dwellers therein and the Government did not file any reply to these motions. Just how the Government sought to defend this search and seizure is not apparent in the record.

No evidence was offered by the Government to show that Pekin, Illinois, was in the Thirteenth Prohibition District of the United States.

That thereafter on to-wit: the 17th day of November, A. D. 1930, the cause came up for trial before the Court for a hearing, a jury having been waived. There was a finding of guilty on all counts except the fifth count.

A judgment was entered in said Court and sentence passed, which said judgment and sentence was as follows:

14 * * (Caption) * *

Thursday, December 18, 1930

Court met pursuant to adjournment.

Present: the Honorable Louis FitzHenry, Judge.

And now on this 18th day of December, A. D. 1930, comes again the United States, the plaintiff in this case, by Walter M. Provine, Esq., United States Attorney for the Southern District of Illinois and come also the defendants, Peter Rossi, alias Peter Russo, and Edward Ehrett, in their own proper persons and by John E. Daugherty, Esq., their attorney and the Court having heard and duly considered the motion of

said defendants for a new trial and being thus fully advised in the premises, overruled the same, to which ruling of the Court the defendants, by their attorney, then and there duly excepted. And thereupon the said defendants entered a motion in arrest of judgment and the Court having heard and duly considered the same, it is ordered that said motion be, and is hereby overruled, to which ruling of the Court the defendants then and there, by their attorneys, duly excepted. Judgment on the verdict.

And the said defendants now being arraigned at the bar of the Court for sentence and each having nothing to say why sentence should not be pronounced against him. It is therefore considered and adjudged by the Court that the said defendants, Peter Rossi, alias Peter Russo, and Edward Ehrett for the offenses by each committed in manner and form as charged in counts one, two and three of the said indictment and as found by the jury in this case, each be confined in the United States Penitentiary at Leavenworth, Kansas, for a period of eighteen months on each of said counts, the sentences of imprisonment herein pronounced on counts one and two of said indictment to run concurrently with sentence of imprisonment pronounced on said count three of said indictment—and for the offense by each committed in manner and form as charged in count four of the said indictment, and as found by the jury in this case be confined in the said United States Penitentiary, at Leavenworth, Kansas, for a period of eighteen months, the sentence of imprisonment herein pronounced to run consecutively to the sentence of imprisonment pronounced on counts one, two and three of said indictment—and also to each pay a fine to the United States in the sum of five hundred dollars on each of counts one, three and four of the said indictment, together with the costs of this prosecution, amounting to the sum of dollars, that execution issue therefor and that said defendants stand committed in said United States Penitentiary, at Leavenworth, Kansas, until the amounts of their respective fines and costs shall have been fully paid or until otherwise discharged by due process of law.

And it is further ordered by the Court that the clerk issue a writ of commitment commanding the Marshal to forthwith take the said Peter Rossi, alias Peter Russo, and Edward Ehrett and to deliver them, together with a true copy of said writ of commitment to the Warden of the United States Penitentiary at Leavenworth, Kansas.

15a It is further ordered by the Court that the verdict herein as to count five of the said indictment be, and is hereby set aside and the said defendants, Peter Rossi, alais Peter Russo, and Edward Ehrett, found not guilty of the charge therein.

That thereafter, to-wit, on the 19th day of December, A. D. 1929, your petitioners filed their petition for appeal which said petition was on that date allowed, and on, to-wit: the 26th day of July, 1930, a transcript of all the proceedings was filed in the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, and said cause was entered and docketed in said Court of Appeals, entitled "Peter Rossi and Edward Ehrett, plaintiffs in error, v. United States of America, defendant in error," and numbered 4594 on said docket.

That the assignment of errors filed in said cause was as follows, to-wit:

54 * * (Caption) * *

ASSIGNMENT OF ERRORS

Now come the defendants, Peter Rossi and Edward Ehrett, and file the following Assignment of Errors upon which they will rely upon their prosecution of the appeal in the above mentioned cause from the orders and judgment of this Honorable Court, entered on the 18th day of December, A. D. 1930.

1. The United States District Court for the Southern District of Illinois erred in overruling and denying the defendants Motion in Arrest of Judgment and entering judgment against them in this case.

2. The District Court erred in overruling and denying the Petition of the defendants to suppress evidence, and in permitting the Government to make proof of the illegal search and seizure.

3. The indictment and each count thereof fails to state
55 any offense against the laws of the United States.

4. The indictment and each count thereof fails to furnish the accused with such a description of the charges against them as will enable them to plead former jeopardy.

5. The indictment and each count thereof fails to set forth the alleged acts of the defendants with reasonable particularity of time, place and circumstance.

6. There is no such substance or thing known to the Internal Revenue Laws of the United States as moonshine whiskey and hootch.

7. There is no evidence in the Record to show that any offense was committed in the Eighth Internal Revenue Collection District of Illinois, or in the Thirteenth Prohibition District of the United States.

8. There is no evidence in the Record that shows to the Court that the alleged still was not registered with the Prohibition Administrator of the Thirteenth Prohibition District of the United States, or that a bond with at least two sureties had not been executed and approved by the Prohibition Administrator of the Thirteenth Prohibition District of the United States, in manner and form as provided by law.

9. There is no evidence in the Record that shows that these defendants were persons who were required to register the alleged still or execute a bond herein.

10. The evidence wholly and entirely fails to show that these defendants or either of them is guilty in manner and form as charged in the indictment.

11. The indictment and each count thereof is drawn
56 under statutes of the United States that had been and were repealed at the time of the commission of the alleged offense, and were directly in conflict with the Act of Congress of October 28th, 1919, commonly known as the National Prohibition Act, whereby they were not reenacted by the Act of Congress of November 23rd, 1921, commonly known as the Willis-Campbell Act, and the Court therefore does not have jurisdiction of the subject matter herein.

PETER ROSSI
EDWARD EHRETT

By: JOHN E. DOUGHERTY,
Attorney for Defendants.

Filed Dec. 19, 1930. S. T. Burnett, Clerk.

That afterwards, to-wit: on the 8th day of October A. D. 1932, the case came on to be heard in the Circuit Court of Appeals before the Honorable Samuel Alschuler, Honorable Evan A. Evans and Honorable Wilkerson. On the 8th day of October, A. D. 1932, a judgment was entered in said cause by the Circuit Court of Appeals of the Seventh Circuit as follows:

> "This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of Illinois, Northern Division, and was argued by counsel.
>
> "On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed."

Your petitioner is advised that said judgment of the Circuit Court of Appeals is final, and is erroneous, and that this Honoroble Court should require the case to be certified to it for its review and determination, under the Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

Your petitioner presents the following grounds upon which this writ of error is sought:

SPECIFICATION OF ERRORS RELIED UPON

1.

The Circuit Court of Appeals erred in overruling and deny-

ing the motion of the petitioners to suppress evidence, and in permitting the Government to make proof of the illegal search and seizure.

2.

There is no evidence in the record to show that any offense was committed in the Eighth Internal Revenue Collection District of Illinois or in the Thirteenth Prohibition District of the United States.

3.

There is no evidence in the record that shows that the alleged still was not registered with the Prohibition Administrator of the Thirteenth Prohibition District of the United States, or that a bond with at least two sureties had not been executed and approved by the Prohibition Administrator of the Thirteenth Prohibition District of the United States in manner and form as provided by law.

4.

There is no evidence in the record that shows that these appellants were persons who were required to register the alleged still or execute bond herein.

5.

The evidence wholly and entirely fails to show that these petitioners or either of them is guilty in manner and form as charged in the indictment.

6.

It is the contention of petitioners that the Circuit Court of Appeals erred in holding that Ehrett waived his constitutional rights as to the search, there being no evidence in the record.

BRIEF OF ARGUMENT

1.

The District Court erred in overruling and denying the motion to suppress evidence and in permitting the Government to make proof of the illegal search and seizure.

Title 27, Sec. 39, U. S. C. A.;
Title 18, Sec. 53, U. S. C. A.;
Lawson v. United States, 9 Fed. (2nd) 747;
Raniele v. U. S., 34 Fed. (2nd) 877;
United States v. Di Corvo, 37 Fed. (2nd) 124;
United States v. Rabstein, 41 Fed. (2nd) 227;
Temporini v. United States, 299 Fed. 365;
United States v. Dean, 50 Fed. (2nd) 905.

One temporarily domiciled in a residence as guest or employe of its owner at time of unlawful search and seizure of still or liquor, was entitled to claim the benefit of motion to suppress, though he did not own building and claimed no interest in the still.

Alvan v. United States, 33 Fed. (2nd) 467;
United States v. DeBousi, 32 Fed. (2nd) 902.

"The plea of not guilty entered in the case at bar is a denial by the defendant that he operated the stills without registering, paying the tax or giving bond. Failure to register, to pay the tax and give the bond when operating the stills are the acts, which, under the law, constitute the offenses, and we cannot hold that implicit either in the defendant's silence or in his denial of the commission of the offence there is an admission of its commission. The question of guilt is to be determined by evidence of the doing or failure to do what the law forbids or requires. Under the plea of not guilty the offenses charged stand out, waiting to be proved by the one that makes the accusation. * * * * Although the Eighteenth Amendment to the Constitution and the National Prohibition Act have greatly affected the manufacture and sale of distilled spirits, they have not repealed the provisions of the Revenue Laws herein issued (page 224). These provisions forbid the distillation of liquor without compliance with their requirements. When not complying with, a still is illicit; when complying with, a still is licit, so that it is affected by this class of legislation. It is a wholly lawful or a wholly unlawful thing, and when in a criminal action under the Revenue Laws it is charged to be unlawful, its character cannot be determied merely by possession, but must be determined by evidence that its possession is not accompanied with the formal requirements conclusive of those laws. Evidence of such fact is always available at the office of the local Collector of Internal Revenue. There is, in the record, no evidence of any kind on these issues. Therefore, we are constrained to reverse the judgment under the first, second, third and fourth counts of the indictment." (The counts of the indictment reversed were the counts charging a violation of the Revenue Laws.)

Mansbach v. United States, 11 Fed. (2nd) 221.

"During the night, November 18th, 1930, a squad (six or more) prohibition agents while returning to Baltimore City discussed premises 5100 Curtis Avenue, of which there had been complaints 'over a period of about a year.' Having decided to investigate they went at once to the garage at that address, arriving there about 2:30 A. M. The garage—a small metal building, is on the corner of a city lot and adjacent to the dwelling in which petitioner Taylor resided. The two houses are part of the same premises.

"As the agents approached the garage, they got the odor of whiskey coming from within. Aided by a searchlight they looked through a small opening and saw many cardboard cases which they thought contained jars of liquor. Thereupon they broke the fastening upon a door, entered, and found 122 cases of whiskey. No one was within the place, and there was no reason to think otherwise.

"While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him.

"Although over a considerable period numerous complaints concerning the use of the premises had been received, the agents had made no effort to obtain a warrant for making a search. They had abundant opportunity so to do and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover a short period of watching would have prevented any such possibility.

"We think, in any view, the action of the agents was inexcusible and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed."

Taylor v. United States, Vol. 52, Supreme Court Report, page 466.

In the United States v. Agnello, 269 U. S., page 20, 70 Law Ed. page 145, Pn. page 147, Justice Butler, delivering the opinion of the Supreme Court, said:

"The protection of the 4th Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant. On the other hand, special limitations have been set about the obtaining of search

warrants for that purpose. Thus, the National Prohibition Act, approved October 28, 1919, Chap. 85, Title II, Sec. 25, 41 Stat. at L. 305, 315, Comp. Stat. Sec. 10, 138½m, Fed. Stat. Anno. Supp. 1919, p. 213, provides that no search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or is in part used for business purposes, such as store, shop, saloon, restaurant, hotel, or boarding house. And later, to the end that Government employees, without a warrant, shall not invade the homes of the people and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States, engaged in the enforcement of any law, to search a private dwelling house without a warrant directing a search. Act of November 23, 1921, Chap. 134, 42 Stat. at L. 222, 223, Comp. Stat. Sec. 10, 184a, Fed. Stat. Anno. Supp., 1921, p. 230. Safeguards similar to the 4th Amendment are deemed necessary and have been provided in the constitution or laws of every state in the Union. We think there is no state statute authorizing the search of a house without a warrant; and, in a number of state laws recently enacted for the enforcement of prohibition in respect to intoxicating liquors, there are provisions similar to those in Sec. 25, of the National Prohibition Act. Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, Federal or State, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful. See Entick v. Carrington, 19 How. St. Tr. 1030, 1066. Belief, however

well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful, notwithstanding facts unquestionably showing probable cause. See Temperani v. United States (C. C. A. 9th), 299 Fed. 365; United States v. Rembert, (D. C.) 284 Fed. 996, 1000; Connelly v. United States, (D. S.), 275 Fed. 509; McClurg v. Brenton, 123 Iowa, 368, 372, 65 L. R. A., 519, 101 Am. St. Rep. 323, 98 N. W. 881; People v. Margolis, 220 Mich., 431, 190 N. W. 306; Childers v. Com. 198 Ky. 848, 250 S. W. 106; State v. Warfield, 184 Wis. 56, 198 N. W. 854."

United States v. Richards (D. C.) 22 Fed. (2d) 988: The officers had evidence that a large distillery was being operated on the premises in question, a private dwelling. They had no evidence that any sales or deliveries of liquor were taking place there. The search warrant was applied for and obtained without any allegation of sale. It is said that it was issued not under the National Prohibition Act, but under the internal revenue statute, (R. S. Sec. 3281; U. S. Comp. Stat. 1916, Sec. 6021 (26 USCA, Sec. 306), which makes it criminal to carry on the business of a distiller without having given bond, etc. The contention of the Government is that search warrants for dwellings may be obtained under this statute without any evidence of sale.

The Court held that limitations on the issue of search warrants contained in Section 25 of the National Prohibition Act (27 USCA, Sec. 39) are applicable under this revenue

statute and there must be evidence of sales and search warrant was quashed.

Thompson v. United States (C. C. A.), 22 Fed. 2d) 134: In that case, where a private dwelling had been searched by Government officers and state police acting together, the Court said of and concerning the search of a private residence:

"It is well settled that the effect of the provisions of the Fourth Amendment to the Constitution of the United States of section 25 of title 2 of the National Prohibition Act. (27 USCA, Sec. 39) and of title 11 of the Espionage Act of June 15, 1917, (40 Stat. 228 USCA 18, Sec. 611 et sep.) is to forbid the search of a private dwelling by a national prohibition agent without a search warrant and to require that a search warrant shall not issue to search a private dwelling, unless it is being used for the unlawful sale of intoxicating liquor."

United States v. Bosparino (D. C.), 21 Fed. (2d) 575: "The important question, however, is whether a private dwelling used as such, was not immune from search without evidence of sale of liquor therefrom. Section 25 of title 2 of the National Prohibition Act (27 USCA, Sec. 39, Comp. St. Sec. 10138½) provides that no search warrant shall issue to search any private dwelling occupied as such, unless it is being used for unlawful sale of intoxicating liquor or unless it is in part used for some business purpose, such as a store, saloon, restaurant, hotel or boarding house. The apartments in question concededly were neither used for dealing in intoxicating liquor, nor was any part used for any business pur-

pose, and therefore the search warrant was illegal and must be vacated and the evidence of seizure suppressed, since it can afford no basis for unlawful possession or manufacture: Jozwich v. United States (C. C. A.) 288, Fed.831; Gouled v. United States, 255 U. S., 298, 41 Sup. Ct. 261, 65 L. ed. 647; United States v. Kelih (D. C.), 272, Fed. 485; and United States v. Deloie (D. C.), 2 Fed. (2d) 377. And this interpretation has heretofore been applied in cases of a similar showing coming before this Court."

Bell v. United States (C. C. A.), 9 Fed. (2d), 820: The Court said in this case, no attempt has been made to uphold the validity of the search warrant in this Court, and it was confessedly void, because issued to search a private dwelling occupied as such without any proof that the dwelling was used for the unlawful sale of intoxicating liquor.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued under the seal of the Court directed to the United States Circuit Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding that Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in said cause to the end that this cause may be reviewed and determined by this Honorable Court, as provided by the Act of Congress, approved March 3rd, 1891, establishing the Circuit Court of Appeals and defining and regulating their jurisdiction, and that the said judgment of the Circuit Court of Appeals be reversed

by this Honorable Court, and for such further relief as may seem proper.

And your petitioner will ever pray.

PETER ROSSI

EDWARD EHRETT

United States of America,
Southern District of Illinois,
County of Peoria.

Peter Rossi and Edward Ehrett, being first duly sworn, upon his oath deposes and says that he has read the foregoing petition by him subscribed, and the facts therein stated are true to the best of his information and belief.

PETER ROSSI

EDWARD EHRETT

Subscribed and sworn to before me this 27th day of December, A. D. 1932.

JOSEPH G. KELLERSTRASS,
Notary Public.

(Seal)

In the

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1932

Peter Rossi and Edward Ehrett,
Petitioners,
vs. No.....
United States of America,
Respondent.

NOTICE OF APPLICATION TO THE SUPREME COURT FOR WRIT OF CERTIORARI.

The responent is hereby notified that petitioner will on....., the..... day of....., 1933, upon his petition and a copy of the entire record in this cause, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (copy of which and of the petition for writ of certiorari and brief in support thereof, as hereinbefore set forth, are herewith delivered to you) to the Supreme Court of the United States in its court room at the Capital in the City of Washington, D. C.

.....

Attorney and Counsel for Petitioners.

Service of the foregoing notice is hereby accepted and the delivery of a copy thereof, and of the petition for writ of certiorari and brief in support thereof referred to herein, are hereby acknowledged this ..... day of ....., 1932.

.....

Attorney and Counsel for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 594

PETER ROSSI AND EDWARD EHRETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 52–54) is reported in 60 F. (2d) 955.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1932. (R. 55.) A petition for rehearing was denied October 7, 1932. (R. 56.) The petition for certiorari was filed January 4, 1933. While petitioners do not so state, presumably they invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal contention urged by petitioners is that their motion to suppress evidence was erroneously denied.

They further assert, without argument in support of the assertion, that the evidence was insufficient to support their conviction because it failed to show (a) that any offense was committed within the Internal Revenue Collection District or Prohibition District specified in the indictment; (b) that the still which petitioners were alleged to have set up was not registered with the appropriate prohibition administrator; (c) that the required bond was not given; and (d) that petitioners were persons who were required to register such still and to furnish such bond.

STATEMENT

Petitioners were indicted in the District Court of the United States for the Southern District of Illinois upon five counts. The first and second counts each charged the carrying on of the business of a distiller with intent to defraud the United States of the tax on the spirits distilled. (Sec. 3281, R. S.;[1] U. S. C., Title 26, Sec. 306.) The third count charged the carrying on of such business without having given the bond required by law. (Sec. 3260, R. S.;[2] U. S. C., Title 26, Sec. 284.) The fourth

[1] See also Sec. 3247, R. S.; U. S. C., Title 26, Sec. 241.
[2] See also Sec. 3281, R. S.; U. S. C., Title 26, Sec. 306.

count charged the possession of a still without the same being registered as required by law. (Sec. 3258, R. S.; U. S. C., Title 26, Sec. 281.) The fifth count charged that having engaged in carrying on the business of a distiller the defendants did "defraud and attempt to defraud" the United States of the tax on the spirits distilled. (Sec. 3257, R. S.;[3] U. S. C., Title 26, Sec. 261.) (R. 1–7.)

Prior to trial petitioners moved to suppress certain evidence as having been obtained in the search of a private dwelling by Federal prohibition agents who had no search warrant or other authority for such search. (R. 11–12.) Decision on the motion was postponed pending the hearing of the evidence offered at the trial (R. 13), and the motion was eventually denied (R. 27). A trial by jury having been waived in writing (R. 13), the case was tried to the court, which found petitioners guilty on all counts (R. 30). The conviction on the fifth count was subsequently set aside and petitioners found not guilty on that count. (R. 10.) Following the denial of motions for a new trial and in arrest of judgment (R. 30–32), the court sentenced each of the petitioners to serve eighteen months' imprisonment on each of the first, second, and third counts, the sentences to run concurrently; to serve eighteen months' imprisonment on the fourth count, the sentence to run consecutively to those imposed upon the first three counts; and to pay a fine of

[3] See footnote 2, *supra*.

$500 on each of the first, third, and fourth counts (R. 9–10). Upon an appeal to the Circuit Court of Appeals the judgment was affirmed. (R. 55.)

The evidence for the Government at the trial tended to establish the following facts: On September 8, 1929, Federal Prohibition Agent Wheeler smelled the odor of fermenting mash emanating from the one-story frame building at 1516 South Fifth Street, Pekin, Illinois, and heard the buzz or hum of an electric pump in the basement. (R. 14.) He returned to the premises on September 10, 1929, accompanied by Agent Johnson and other Federal prohibition agents. As the officers drove up to the place they smelled the odor of cooking alcohol. (R. 17, 20.) Two went around the building on one side and two on the other side to the rear, where an opening into the basement had been cut through a brick wall and a double door inserted. (R. 14.) On the way around Johnson passed an open window through which he saw a still and heard the pump of an oil burner in operation. (R. 17.) Upon reaching the rear door the agents heard two men talking in the basement. Johnson called out "Hello," and after a few minutes the petitioner Ehrett opened the door and came out. Johnson asked him whether he had a still in there, and, upon his replying "No," asked whether he cared if the officers went in to look. Ehrett answered "No," and was starting to leave when Johnson told him that he would have to go with the agents, thus plac-

ing him under arrest before any search was made. (R. 14, 16, 17–18, 20.) Taking Ehrett with them, the agents entered the basement and there found a 300-gallon still in operation, a 10-horsepower boiler, an oil burner, a motor pump, 22 five-gallon cans of uncolored spirits, a 15-gallon still set up but not operating, two barrels of mash, and a 15-gallon wooden keg containing "some kind of alcoholic liquor." From the larger still a 9-foot column extended through a wooden compartment or shaft leading from the basement to the attic, where it was connected with a 100-gallon condenser. (R. 14–16, 18, 19.) Ehrett turned off the oil burner which was under the steam boiler. (R. 20.) He told the officers that the "outfit" or "plant" belonged to him[4] and asked "couldn't we fix this." (R. 15, 16, 20.) Two of the officers climbed up the still column to the attic and found the petitioner Rossi hiding behind a projecting piece of wood under the eaves. He was wearing a blue work shirt and had grease and oil on his hands. He told the officers that he had been called to the house to fix a pump; that he did not know that there was a still there, and that he had just arrived when the officers came. (R. 15, 18, 20.) The officers had no search warrant. (R. 19.)

Mrs. Adolph Faux, called by the court as a witness, testified that she had lived on the premises

[4] One of the two agents who testified that Ehrett said the "plant" or "outfit" was his, on cross-examination stated that "Ehrett said it wasn't his still." (R.21.)

in question for about nine months prior to September 10, 1929, and that she was there on that day when the raid took place; that there were five rooms and a bath in the house, all on one floor; that she had rented the property from a "Mr. Velde" for $30 a month, and had sublet the basement about a week and a half before the raid to "Mr. John Smith, of Pekin" for $100 a month; that immediately upon her renting the basement the stairs from the kitchen to the basement were taken out and the kitchen door leading to that stairway was padlocked and nailed up so that she could not use it; that she had reserved the whole house for herself except what she had rented to John Smith, but had stayed there only once in a while, as she was having trouble with her husband and they had separated about three weeks before she rented the basement; that she knew the defendant Rossi when she saw him, and also knew "the man sitting next to him [Ehrett] but not to speak to him," and that she had never seen either of them "around there." (R. 24–25.) Upon cross-examination Mrs. Faux stated that neither Rossi nor Ehrett was a guest of hers on the day of the raid; that she did not see either of them that day; that between the day she rented the basement and the day the raid occurred she did not authorize anyone to live in the rooms of the house, and that to her knowledge no one stayed in those rooms. (R. 27.)

One of the prohibition agents testified that petitioner Ehrett said, apparently at the time of the raid, that he lived at 1115 South Fourth Street, in Pekin, and a mail carrier testified that during September, 1929, he "delivered letters to Peter Rossi at 731 Prince Street." (R. 22.) The premises searched were located at 1516 South Fifth Street.

The petitioners called as a witness the husband of Mrs. Faux, who testified that he examined the premises in question on the morning of September 11, 1929, the day following the search, and that at that time the door leading from the kitchen to the basement was not nailed and the basement steps were intact, with the exception of the middle step, which was just hanging down. He also testified that during the latter part of August, 1929, he asked petitioner Ehrett, whom he had known a long time, to go out to the witness's house and fix a radio which he had bought of Mr. Ehrett. (R. 28–29.)

The Government stipulated that prior to their search of the premises the agents did not know that "any door had been locked or closed or nailed causing a separation from the basement, of * * * [the] premises." (R. 30.)

ARGUMENT

I

It is well settled that an objection to evidence on the ground that it was obtained in violation of the Constitution or laws of the United States is avail-

able only to one whose rights have been invaded by the acts claimed to be unlawful. *Agnello* v. *United States*, 269 U. S. 20, 35; *Chicco* v. *United States*, 284 Fed. 434, 436 (C. C. A. 4th); *Lewis* v. *United States*, 6 F. (2d) 222, 223 (C. C. A. 9th); *Graham* v. *United States*, 15 F. (2d) 740, 742 (C. C. A. 8th); *United States* v. *Messina*, 36 F. (2d) 699, 700 (C. C. A. 2d); *In re Dooley*, 48 F. (2d) 121 (C. C. A. 2d). In their motion to suppress petitioners made no claim of any ownership of or interest in the property seized. Their assertion therein that their rights under the Constitution and laws of the United States had been violated was based solely upon the allegation that "they were each guests, and as such guests temporarily domiciled at the private dwelling of one Nellie Faux, in the City of Pekin, Illinois." (R. 11.) No evidence was submitted by them in support of that allegation, and it was fully refuted by the testimony of Mrs. Faux that petitioners were not her guests or residing in her home at the time of the search and seizure, and that she had never seen either of them around there. (R. 25, 27.)

If it be assumed that, by reason of its having been partitioned off from the remainder of the dwelling, that part of the house in which the search and seizure took place comprised separate premises, the assumption would not aid petitioners, for the evidence shows that the segregated portion was leased

to one John Smith (R. 25) and fails to show any interest of petitioners in such lease.

No claim is made in the petition to suppress that petitioners were in the premises either as employees of the "owners" of the property seized or of the premises searched, as intimated in the petition and supporting brief (pp. 4, 10), and there is nothing in the evidence to that effect. There is testimony in the record which indicates that petitioner Ehrett was the owner of the "outfit" or "plant," although there is a conflict as to that, and there is also defense testimony that Ehrett was asked to go to the premises to repair a radio which had been purchased from him. No claim was made in the petition to suppress by Ehrett as owner of the seized property. Rossi asserted that he did not know that there was a still on the premises and that he went there to fix a pump.

The cases cited by petitioners to the effect that persons domiciled upon the premises searched as guests or employees of the owner may invoke the protection of the Fourth Amendment are not in point, as the evidence in the instant case does not show that either petitioner was a guest or employee.

The cases cited by petitioners involving the search of private dwellings are also inapplicable. The evidence in this case shows a complete severance, physical and legal, of the basement from the living quarters on the first floor of the premises. The occupant of the living quarters leased the basement and thereafter was not permitted to use it by

her sublessee. In fact, she was barred from such use by the removal of the steps which led from the basement to the first floor and by the nailing of the door at the head of the steps.

Moreover, the evidence introduced by the Government, reviewed at length at pp. 4–5, *supra,* clearly shows that the officers had reasonable grounds to believe that the manufacture of intoxicating liquor was being carried on in the basement in question and that those engaged in or aiding in the manufacture of such liquor were then in the basement. Accordingly, the search of the premises was authorized as incident to the lawful arrest of the petitioners for an offense committed in the presence of the officers. In addition, there is evidence tending to show a consent to the search by the one who called himself the owner of the "outfit" or "plant." That the search was not unreasonable in extent is not disputed. There is no adequate showing, we submit, that the search violated the constitutional rights of the petitioners.

Taylor v. *United States,* 286 U. S. 1, also relied upon by petitioner, is unlike the instant case. There this Court specifically pointed out that "No one was within the place" searched "and there was no reason to think otherwise."

II

Each count of the indictment alleged that the offense therein charged was committed "at * * * the City of Pekin * * * in the State

of Illinois, in the * * * Southern District aforesaid * * *," and the evidence showed the offense to have been committed in Pekin and therefore within the jurisdiction of the court. But, because the offense was additionally alleged to have been committed within the Eighth Internal Revenue Collection District of Illinois and within the Thirteenth Prohibition District of the United States, petitioners contend that it was incumbent upon the Government to establish that Pekin was within these administrative districts, and that having failed to do so the conviction of petitioners was unlawful. It is well established, however, that the courts will take judicial notice of the location and extent of the administrative subdivisions of the United States. *United States* v. *Jackson,* 104 U. S. 41, 42. See *Caha* v. *United States,* 152 U. S. 211, 221–222; *Hoyt* v. *Russell,* 117 U. S. 401, 404–405; *Crinnian* v. *United States,* 1 F. (2d) 643, 644–645 (C. C. A. 6th). Proof that the offense was committed within the administrative districts alleged was, therefore, not required.

Petitioners contend further that the evidence was insufficient to sustain their convictions under the third and fourth counts since it failed to show that the still referred to in those counts was not registered with the appropriate prohibition administrator, that the required bond was not given, and that petitioners were persons required to register the still and to execute the bond. This contention was not brought to the attention of the trial court

by an appropriate motion or otherwise, and accordingly we think that petitioners are not in a position to raise the point in this Court. *Ayers* v. *United States,* 58 F. (2d) 607, 609 (C. C. A. 8th).

Moreover, we think the contention is lacking in merit. The possession by petitioners of a still found in the process of distilling spirits unlawfully having been established by the evidence, the burden was cast upon them to show that the still was duly registered and the bond given, or that they were not persons required to register the still or give the bond. See *Barton* v. *United States,* 267 Fed. 174, 175 (C. C. A. 4th); *Giacolone* v. *United States,* 13 F. (2d) 108, 110 (C. C. A. 9th); *Cardenti* v. *United States,* 24 F. (2d) 782, 783 (C. C. A. 9th); *Mangiaracina* v. *United States,* 40 F. (2d) 164, 166 (C. C. A. 8th); *Stark* v. *United States,* 44 F. (2d) 946, 949–950 (C. C. A. 8th). As stated in *Giacolone* v. *United States, supra.*

> It is further contended that the burden of proof was on the government to show that the stills were not registered and that the plaintiff in error failed to give bond. But the fact of registration and the fact of giving bond were peculiarly within the knowledge of the plaintiff in error, and the burden was therefore upon him to show a compliance with the requirements of the statute.

The evidence recited at pp. 4–6, *supra,* tends to show that petitioner Ehrett either actually was the owner of the distilling "outfit," or "plant,"

or had such complete control and possession thereof as to come within the class of persons required to register a still and give the statutory bond. (Sec. 3258, R. S., U. S. C., Title 26, Sec. 281; Sec. 3259, R. S., U. S. C., Title 26, Sec 282; Sec. 3260, R. S., U. S. C., Title 26, Sec. 284.) As the evidence was ample to support the finding that the petitioner Rossi was aiding and abetting Ehrett in the violations of law charged in the indictment, the conviction of Rossi as a principal in the commission of such offenses was fully justified without a showing that Rossi also was a person required to register the still and give the bond. (Sec. 332, Crim. Code; U. S. C., Title 18, Sec. 550.)

Mansbach v. *United States,* 11 F. (2d) 221 (C. C. A. 3d), cited by petitioners, appears to hold that it was incumbent upon the Government affirmatively to establish that the still was not registered and that the required bond was not given, and this is inconsistent or in conflict with the decisions above cited. Although the contention as to the insufficiency of the evidence to sustain the convictions upon the third and fourth counts was not made in the trial court, it was presented to and decided by the Circuit Court of Appeals. There thus appears to be a conflict between the decision in the *Mansbach case* and the decisions in the instant case and other cases above cited.

CONCLUSION

The case was correctly decided below. It presents no question of sufficient general importance to warrant a review on certiorari, except the question presented by the conflict between the decision in the *Mansbach case* and the decisions in the case at bar and other like cases. We do not oppose the granting of a writ of certiorari but suggest that if certiorari be granted the review of the instant case be limited to the question of the sufficiency of the evidence to support the convictions under the third and fourth counts.

Respectfully submitted.

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In the Supreme Court of the United States

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No. 594

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 52–54) is reported in 60 F. (2d) 955.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1932. (R. 55.) A petition for rehearing was denied October 7, 1932. (R. 56.) The petition for certiorari was filed January 4, 1933, and was granted February 6, 1933, limited as hereinafter set forth. (R. 58.) The jurisdiction

of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the evidence was sufficient "to support conviction upon the third and fourth counts." (R. 58.)[1] More specifically, the question presented is whether upon the evidence the trial judge was warranted in finding (*a*) that the still found in petitioners' custody and control, while being used for the unlawful manufacture of distilled spirits, was not registered, as alleged in the fourth count, and (*b*) that the required distiller's bond had not been given, as alleged in the third count.

---

[1] The limitation of the writ of certiorari to this question was in accordance with the suggestion contained in the Government's brief heretofore filed in this case (p. 14). The Government's suggestion was expressly predicated upon the conflict between the instant case and *Mansbach* v. *United States*, 11 F. (2d) 221 (C. C. A. 3d); in all other respects the petition for certiorari was opposed. The conflict related solely to the adequacy of the proof with respect to the allegation in the third count (R. 5) that the statutory bond had not been executed and the allegation in the fourth count (R. 6) that the still had not been registered. This brief is accordingly confined to a discussion of these points.

While the sufficiency of the evidence to support conviction upon the third and fourth counts was challenged in the petition for certiorari upon other grounds, we deem it to have been the intention of this Court to limit review to the points discussed in this brief. If we are wrong in this assumption, we respectfully refer to our memorandum filed in response to the petition for a discussion of petitioners' contentions upon points not covered by this brief.

STATUTES INVOLVED

Section 3258 of the Revised Statutes (U. S. C., Title 26, Sec. 281) provides:

> Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same * * *. Stills and distilling-apparatus shall be registered immediately upon their being set up. * * * And every person having in his possession or custody, or under his control, any still or distilling-apparatus set up which is not so registered, shall pay a penalty of five hundred dollars, and shall be fined not less than one hundred dollars, nor more than one thousand dollars, and imprisoned for not less than one month, nor more than two years.

Section 3260 of the Revised Statutes (U. S. C., Title 26, Sec. 284) provides:

> Every person intending to commence or to continue the business of a distiller shall * * * before proceeding with such business * * * execute a bond [with specified conditions]. * * * Every person who fails or refuses to give the bond hereinbefore required * * * shall forfeit the distillery, distilling-apparatus, and all real estate and premises connected therewith, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

STATEMENT

Petitioners were indicted in the District Court of the United States for the Southern District of Illinois upon five counts charging violations of the internal revenue laws. (R. 2–7.) The third and fourth counts, which are the only ones here involved (R. 58), charged, respectively, the carrying on of the business of a distiller without having given the bond required by law (Sec. 3260, R. S.;[2] U. S. C., Title 26, Sec. 284), and the custody and control of a still without the same being registered as required by law (Sec. 3258, R. S.; U. S. C., Title 26, Sec. 281) (R. 4–6). Following a trial, which by written stipulation was without a jury (R. 13), the trial judge found petitioners guilty on all counts (R. 30), but subsequently set aside the conviction on the fifth count (R. 10). Each petitioner was sentenced, on the third count, to serve eighteen months' imprisonment and to pay a fine of $500, the prison sentence to run concurrently with like sentences imposed upon the first and second counts, and on the fourth count, to serve eighteen months' imprisonment and to pay a fine of $500, the prison sentence to run consecutively to those imposed on the first three counts. (R. 9–10.) Upon appeal to the Circuit Court of Appeals the judgment was affirmed. (R. 55.) This Court granted a writ of certiorari "limited to the question of the sufficiency

[2] See also Sec. 3281, R. S.; U. S. C., Title 26, Sec. 306.

of the evidence to support conviction upon the third and fourth counts." (R. 58.)

At the trial the Government adduced evidence which, if believed, tended to establish the following facts: On September 8, 1929, Federal Prohibition Agent Wheeler smelled the odor of fermenting mash emanating from the one-story frame dwelling house (R. 16, 19, 24, 28) at 1516 South Fifth Street, Pekin, Illinois, and heard the buzz or hum of an electric pump in the basement (R. 14). He returned to the premises on September 10, 1929, accompanied by Agent Johnson and other agents. As the officers drove up to the place they smelled the odor of cooking alcohol. (R. 17, 20.) Two of them went around the building on one side and two on the other side to the rear, where an opening into the basement had been cut through a brick wall and a double door inserted. (R. 14.) On the way around Johnson passed an open window through which he saw a still and heard the pump of an oil burner in operation. (R. 17.) Upon reaching the rear door the agents heard two men talking in the basement. Johnson called out "Hello," and after a few minutes the petitioner Ehrett opened the basement door and came out. Johnson asked him whether he had a still "down there" and, upon his replying "No," asked whether he cared if the officers went in to look. Ehrett answered "No," and was starting to leave, when Johnson told him that he would have to go

with the agents, thus placing him under arrest. (R. 14, 16, 17–18, 20.)

Taking Ehrett with them, the agents entered the basement and there found a 300-gallon still in operation, a 15-gallon still, not in operation but set up ready for use, a 10-horsepower boiler, an oil burner, a motor pump, several barrels of mash, a quantity of alcohol, 22 five-gallon cans of uncolored spirits, and a 15-gallon wooden keg containing "some kind of alcoholic liquor." From the larger still a 9-foot column extended through a wooden compartment or shaft leading from the basement to the attic, where it was connected with a 100-gallon condenser. (R. 14–16, 17, 18, 19, 20.) Ehrett turned off the oil burner which was under the steam boiler. (R. 20.) He told the officers that the "outfit" or "plant" belonged to him[3] and asked "couldn't we fix this?" (R. 15, 16, 19, 20.) Two of the officers climbed up the still column to the attic and found the petitioner Rossi hiding behind a projecting piece of wood under the eaves. He was wearing a blue work shirt and had grease and oil on his hands. He told the officers that he had been called to the house to fix a pump; that he did not know there was a still there; that he had just arrived when the officers came; that this was the second still at which he had been caught and that he "wanted to fix it up." (R. 15, 18, 20, 21.)

[3] One of the two agents who testified that Ehrett said the "plant" or "outfit" was his (R. 15, 20), on cross-examination stated that "Ehrett said it wasn't his still." (R. 21.)

Mrs. Adolph Faux, called by the court as a witness (R. 24), testified that she had lived on the premises in question for about nine months prior to September 10, 1929, and that she was there on the day when the raid took place; that there were five rooms and a bath in the house, all on one floor; that she had rented the property from a "Mr. Velde" for $30 a month, and had sublet the basement about a week and a half before the raid to "Mr. John Smith, of Pekin," for $100 a month; that immediately upon her renting the basement the stairs from the kitchen to the basement were taken out and the kitchen door leading to that stairway was padlocked and nailed up so that she could not use it; that she had reserved the whole house for herself except what she had rented to John Smith; that she knew the defendant Rossi when she saw him, and also knew "the man sitting next to him [Ehrett] but not to speak to him," and that she had never seen either of them "around there." (R. 24–25.) Upon cross-examination Mrs. Faux stated that neither Rossi nor Ehrett was a guest of hers on the day of the raid, that she did not see either of them that day, that between the day she rented the basement and the day the raid occurred she did not authorize anyone to live in the rooms of the house, and that to her knowledge no one stayed in those rooms. (R. 27.)

The petitioners did not take the witness stand and introduced no evidence tending to show that

the still was registered or that the statutory bond had been given.

SUMMARY OF ARGUMENT

The evidence introduced by the Government clearly established that petitioners were arrested while having custody and control of a still and while engaged in the unlawful distillation of alcoholic spirits. Upon this proof the trial court was warranted in finding, in the absence of evidence to the contrary, that the still was not registered and that the statutory bond had not been given. It has been repeatedly held, under indictments similar to the one here involved, that proof of the custody of a still and of the unlawful distillation of alcoholic spirits gives rise to an inference of lack of registration and failure to give bond which it is incumbent upon the defendant to overcome by evidence to the contrary.

Moreover, even if the Government was required to establish by direct evidence that the still was not registered and the bond not given, it adequately met this burden by showing that the still, which was in a "dwelling house" or "enclosure connected with" a dwelling house, was one which could not legally have been registered and with respect to which no distiller's bond could lawfully have been given.

ARGUMENT

The contention that the evidence was not sufficient to sustain petitioners' conviction upon the

third and fourth counts was not presented to the trial court during the course of the trial by appropriate motion or otherwise. Although it was presented to (R. 35) and passed upon (R. 54) by the Circuit Court of Appeals, the general rule is well settled that an appellate court may review only rulings made by the trial court on questions brought to the attention of and passed upon by the trial court. *Ayers* v. *United States,* 58 F. (2d) 607 (C. C. A. 8th); *Silva* v. *United States,* 35 F. (2d) 598 (C. C. A. 9th). Accordingly, if the Circuit Court of Appeals possessed authority to pass upon the sufficiency of the evidence, such authority must rest upon the rule that in a criminal case an appellate court may notice a "plain error" in a matter "vital to the defendants" even though the error was not brought to the attention of or ruled upon by the trial court. *Wiborg* v. *United States,* 163 U. S. 632, 658–600; *Clyatt* v. *United States,* 197 U. S. 207, 221–222.

The character of the place and manner of petitioners' operations, their conduct at the time of the search and arrest, their failure at the time to make any explanation of the incriminating facts discovered by the searching officers, and other facts shown by the evidence, as set forth in the statement of facts (pp. 5–7, *supra*), clearly establish that the petitioners were arrested while having custody and control of a still and while engaged in the unlawful

distillation of alcoholic spirits. These facts having been plainly demonstrated, the trial judge was warranted in finding, in the absence of evidence to the contrary, that the still was not registered, as charged in the fourth count, and that the statutory bond had not been given, as charged in the third count. It has repeatedly been held that proof of the unlawful custody or control of a still and of the unlawful distillation of alcoholic spirits gives rise to an inference of lack of registration and failure to give bond which it is incumbent upon the defendant to overcome by proof to the contrary. *Barton* v. *United States,* 267 Fed. 174, 175 (C. C. A. 4th); *McCurry* v. *United States,* 281 Fed. 532, 533 (C. C. A. 9th); *Goodfriend* v. *United States,* 294 Fed. 148, 150 (C. C. A. 9th); *Giacolone* v. *United States,* 13 F. (2d) 108, 110 (C. C. A. 9th); *Seiden* v. *United States,* 16 F. (2d) 197, 199 (C. C. A. 2d); *Colasurdo* v. *United States,* 22 F. (2d) 934, 935 (C. C. A. 9th); *Cardenti* v. *United States,* 24 F. (2d) 782, 783 (C. C. A. 9th); *Mangiaracina* v. *United States,* 40 F. (2d) 164, 166 (C. C. A. 8th); *Stark* v. *United States,* 44 F. (2d) 946, 949–950 (C. C. A. 8th). And see *Vukich* v. *United States,* 28 F. (2d) 666, 669 (C. C. A. 9th), certiorari denied, 279 U. S. 847; *Sharp* v. *United States,* 280 Fed. 86, 89 (C. C. A. 5th), certiorari denied, 260 U. S. 730; *Morris* v. *United States,* 161 Fed. 672, 677 (C. C. A. 8th); *Faraone* v. *United States,* 259 Fed. 507,

509 (C. C. A. 6th). Thus, in *Giacolone* v. *United States, supra,* the court said (p. 110):

> It is further contended that the burden of proof was on the government to show that the stills were not registered and that the plaintiff in error failed to give bond. But the fact of registration and the fact of giving bond were peculiarly within the knowledge of the plaintiff in error, and the burden was therefore upon him to show a compliance with the requirements of the statute.[4]

The cases above cited find support in firmly established principles of the law of evidence. Concededly, in criminal cases, the burden of establish-

[4] Some of the Federal cases above cited and certain of the State decisions cited at p. 15, *infra*, seem to hold that after the prosecution has shown the unlawful custody and operation of a still the defendant has the burden of proving, by a preponderance of evidence, that the still was registered and that the statutory bond was given. The other cases apparently take the view that the effect of the evidence adduced by the prosecution is merely to shift to the defendant the burden of going forward with some evidence to show that the still was not registered or the bond not given, with the result that conviction follows if the defendant fails to introduce any evidence with respect to these issues. All of the cases cited necessarily hold that the evidence adduced by the prosecution gives rise to an inference that the still was not registered and bond not given, which is sufficient to take the case to the jury. See Wigmore on Evidence, 2d Ed., §§ 2486, 2487, 2489, 2512. It is not necessary in the instant case to determine which of these views is correct, since the only question here is the sufficiency of the evidence to sustain the convictions. Obviously under either view the decision of the Circuit Court of Appeals was correct.

ing guilt rests upon the prosecution throughout the trial, but as this Court pointed out in *Agnew* v. *United States,* 165 U. S. 36, 50—

> when a *prima facie* case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused.[5]

Moreover, as pointed out by Professor Wigmore (Wigmore on Evidence, 2d Ed., § 2512)—

> the fixing of a particular fact on this or that party as a part of his case is in general only a question of sound policy as based on experience.[6]

In recognition of these principles, and as the result of judicial experience with certain issues in criminal trials, it has frequently been held that negative averments of facts peculiarly within the knowledge of the defendant need not be directly

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[5] See also *Yee Hem* v. *United States*, 268 U. S. 178, 184–185; *Dunlop* v. *United States*, 165 U. S. 486, 502–503; *Wilson* v. *United States*, 162 U. S. 613, 619; *Lindsey* v. *United States*, 264 Fed. 94, 96 (C. C. A. 4th) certiorari denied, 252 U. S. 583. The shifting to the defendant of the burden of going forward with the evidence on certain issues of fact finds frequent, though varying, illustrations in criminal prosecutions where the issues of insanity and self-defense are raised, or in prosecutions involving the possession of stolen goods. See Wigmore on Evidence, 2d Ed. §§ 2501, 2512, 2513. See *Davis* v. *United States*, 160 U. S. 469, 486–488.

[6] See also Thayer, A Preliminary Treatise on Evidence (1898), pp. 549–550; Zechariah Chafee, Jr., "The Progress of the Law, 1919–1921," 35 Harv. L. R. 302, 311.

and specifically proved by the prosecution.[7] Thus, it is almost uniformly held that in a prosecution for the doing of an act which is unlawful unless done under a license or permit, proof of the doing of the act casts upon the defendant the burden of going forward with evidence to prove that he acted with authority.

In Chamberlayne's Modern Law of Evidence, Vol. 2, Sec. 983, the principle governing this class of cases is thus stated:

> the rule—that he who has the better knowledge, especially if he can with it make affirmative proof, is under the burden of evidence—has been widely accepted both in England and America. * * * Thus where one is accused of doing an act which would be unlawful unless the doer has received a special authority permission of law, the government may properly allege that he has done the act—e. g., that he has operated a ferry, practiced medicine, sold intoxicating liquor or the like without license or authority in law. When the act itself is proved, it may then be required of the *defendant* that he then himself exhibit and prove his license and authority;—the burden of evidence being shifted to him for that purpose. The short reason for this requirement is that

[7] Recognition of the policy behind this rule is frequently found in statutes. Thus, Section 32, Title II, of the National Prohibition Act (U. S. C., Title 27, Sec. 49) provides that an indictment under that Act need not include "any defensive negative averments." See also *Yee Hem* v. *United States*, 268 U. S. 178.

> license or authority is a fact easy for him to prove and difficult for the prosecution to disprove.

In Greenleaf on Evidence, 16th Ed., Vol. 1, Sec. 79, p. 154, the following statement of the doctrine is given:

> But where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it, without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great.

See also Wigmore on Evidence, 2d Ed., Sec. 2512 (d), footnote 4; Bishop, Statutory Crimes, 3d Ed., Sec. 1051; Wharton, Criminal Evidence, 10th Ed., Vol. I, Sec. 332.

The principle has also been generally recognized and followed in the State courts. See *Gains* v. *State,* 149 Ala. 29, 32; *Moore* v. *State,* 154 Ark. 13, 15–16; *People* v. *Boo Doo Hong,* 122 Cal. 606, 607–608; *People* v. *Montgomery,* 271 Ill. 580, 582; *Smith* v. *Commonwealth,* 196 Ky. 188, 190–192; *State* v. *Posey,* 157 La. 55, 58; *State* v. *Crowell,*

25 Me. 171, 173; *State* v. *Casto,* 231 Mo. 398, 408; *Hornberger* v. *State,* 47 Neb. 40, 45; *State* v. *Shaw,* 35 N. H. 217, 219; *Parker* v. *State,* 61 N. J. L. 308, 312; *People* v. *Willi,* 109 Misc. Rep. 79, affirmed, 184 N. Y. Supp. 943; *Blackman* v. *Commonwealth,* 124 Pa. 578, 582–583; *State* v. *Hays,* 38 S. D. 546; *State* v. *Shelton,* 16 Wash. 590, 592. See also *King* v. *Burdett,* 4 B. & Ald. 95, 140.

The only decision at substantial variance with that of the instant case which has come to our attention is *Mansbach* v. *United States,* 11 F. (2d) 221 (C. C. A. 3d). There, in setting aside the defendant's conviction upon charges similar to those here involved, the court said (pp. 223–224):

> The plea of not guilty entered in the case at bar is a denial by the defendant that he operated the stills without registering, paying the tax, or giving bond. Failure to register, to pay the tax, and give bond when operating the stills are the acts which, under the law, constitute the offenses and we can not hold that implicit either in the defendant's silence or in his denial of the commission of the offense there is an admission of its commission. The question of guilt is to be determined by evidence of the doing or failure to do what the law forbids or requires.
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> * * * * *
>
> These provisions [of the internal revenue laws] forbid the distillation of liquor without compliance with their requirements.

> When not complied with, a still is illicit; when complied with, a still is licit, so far as it is affected by this class of legislation. It is a wholly lawful or a wholly unlawful thing, and when in a criminal action under the revenue laws it is charged to be unlawful, its character can not be determined merely by possession but must be determined by evidence that its possession is not accompanied with the formal requirements of those laws. Conclusive evidence of such facts is always available at the office of the local collector of internal revenue. There is in the record no evidence of any kind on these issues.

As in the case at bar, the evidence in the *Mansbach case,* set out in the dissenting opinion of Judge Buffington, was ample to establish the custody and control by the defendant of a still which was being used by him for the unlawful distillation of alcoholic spirits. In holding that this proof did not sustain defendant's conviction in the absence of direct proof by the Government that the still was not registered and the required bond not given, the *Mansbach* decision is opposed to the overwhelming weight of authority and, we submit, is erroneous.

In the petition for certiorari (p. 9) petitioners allege that there was no evidence showing that petitioners "were persons who were required to register the alleged still or execute bond herein." No argument was made in support of this contention, and we think it is unfounded.

The evidence recited at pp. 5–7, *supra,* tends to show that petitioner Ehrett either was the owner of the distilling "outfit," or "plant," or had such control and custody thereof as to come within the class of persons required to register a still and give the statutory bond. (See Sec. 3258, R. S., U. S. C., Title 26, Sec. 281; Sec. 3259, R. S., U. S. C., Title 26, Sec. 282; Sec. 3260, R. S., U. S. C., Title 26, Sec. 284. See also *United States* v. *Messina,* 36 F. (2d) 699, 701 (C. C. A. 2d); *Mangiaracina* v. *United States,* 40 F. (2d) 164, 166 (C. C. A. 8th), *supra; Otto* v. *United States,* 29 F. (2d) 504 (C. C. A. 7th); *Colasurdo* v. *United States,* 22 F. (2d) 934, 935 (C. C. A. 9th), *supra; Giacolone* v. *United States,* 13 F. (2d) 108, 110 (C. C. A. 9th), *supra.* While there was no evidence that Rossi owned any interest in the still, we think the trial court was warranted in finding that he had control or custody thereof. Moreover, since there was ample evidence to support a finding that Rossi was aiding and abetting Ehrett in the violations of law charged in the third and fourth counts, his conviction as a principal in the commission of such offenses was fully justified without a showing that he also was a person required to register the still and give a bond. (See Section 332 of the Criminal Code; U. S. C. Title 18, Sec. 550. See also *Vukich* v. *United States,* 28 F. (2d) 666, 668–669 (C. C. A. 9th), certiorari denied, 279 U. S. 847.)

Even if the failure to register the still and to give the required bond be regarded as facts as to which the petitioners at no stage of the trial were under any burden to adduce proof, we think the evidence was sufficient to sustain the convictions. The still in question was located in the basement of a dwelling house.[8] (R. 16, 19, 24, 28.) Section 3266 of the Revised Statutes, as amended (U. S. C., Title 26, Sec. 291), provides that—

> No person shall use any still * * * *in any dwelling house, or in any shed, yard, or inclosure connected with any dwelling house* * * *; and every person who does any of the acts prohibited by this section, or aids or assists therein, * * * shall be fined $1,000 and imprisoned for not less than six months nor more than two years, in the discretion of the court, * * * (Italics ours.)

We think that the prosecution sufficiently proved that the still was not registered and that the required bond was not given by the presentation of evidence which established that the still was one which could not legally have been registered and with respect to which no distiller's bond could law-

[8] Although there was evidence that the basement was sealed off from all the rest of the house except the attic and was apparently used only for the unlawful distilling operations (R. 14, 15, 24, 27, 30), the place searched is repeatedly referred to in the petition for certiorari as a "dwelling house."

fully have been given. See *Stark* v. *United States*, 44 F. (2d) 946, 949–950 (C. C. A. 8th), *supra*. Cf. *Vukich* v. *United States*, 28 F. (2d) 666, 669 (C. C. A. 9th), certiorari denied, 279 U. S. 847, *supra*.

CONCLUSION

The judgment of the Circuit Court of Appeals with respect to the third and fourth counts should be affirmed.

Respectfully submitted.

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MARCH, 1933.

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SUPREME COURT OF THE UNITED STATES.

No. 594.—October Term, 1932.

Peter Rossi and Edward Ehrett, Petitioners, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[April 10, 1933.]

Mr. Justice McReynolds delivered the opinion of the Court.

An indictment, five counts, in the United States District Court, Southern District of Illinois, alleged that petitioners had violated the Internal Revenue laws in sundry ways. The third count charged them with carrying on the business of a distiller without having given the bond required by Section 3260, Rev. Stats., U. S. C. Title 26, Sec. 284.* The fourth charged possession and control of a still not registered as required by Sec. 3258, Rev. Stats., U. S. C. Title 26, Sec. 281.† They pleaded not guilty; waived a jury; went to trial before the Judge. He found them guilty under both the third and fourth counts and imposed appropriate sentence.

*Sec. 281. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same . . . Stills and distilling apparatus shall be registered immediately upon their being set up. . . . And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of five hundred dollars, and shall be fined not less than one hundred dollars, nor more than one thousand dollars, and imprisoned for not less than one month, nor more than two years.

†Sec. 284. Every person intending to commence or to continue the business of a distiller shall . . . before proceeding with such business . . execute a bond [with specified conditions]. . . . Every person who fails or refuses to give the bond hereinbefore required . . . shall forfeit the distillery, distilling apparatus, and all real estate and premises connected therewith, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years.

The only point presented by the record for our consideration is whether there was adequate evidence to support the conviction.

There was enough to show that the petitioners had custody and control of a still for the manufacture of alcoholic spirits set up and operating, or ready for operation, in a dwelling house. They did not take the stand; no affirmative evidence of failure to register the still or to give bond as required by the Revised Statutes was presented.

The United States claim that in such circumstances the burden of proof to show execution of the bond and registration of the still rested upon the petitioners; that having failed to sustain this the Judge properly declared them guilty as charged. And with this view we agree.

Section 3266, Rev. Stats., U. S. C. Title 26, Section 291, provides—

> "No person shall use any still . . . in any dwelling house, or in any shed, yard, or inclosure connected with any dwelling house . . . ; and every person who does any of the acts prohibited by this section, or aids or assists therein, . . . shall be fined $1,000 and imprisoned for not less than six months nor more than two years, in the discretion of the court, ..."

It was impossible for the petitioners lawfully to register the still or to give the required bond.

The lower federal courts generally have accepted the doctrine that proof of the custody or control of a still for unlawful distillation of alcoholic spirits is enough to give rise to an inference of lack of registration and failure to give bond which the defendant must overcome by proof. *Barton* v. *United States*, 267 Fed. 174, 175; *McCurry* v. *United States*, 281 Fed. 532, 533; *Goodfriend* v. *United States*, 294 Fed. 148, 150; *Giacolone* v. *United States*, 13 F. (2d) 108, 110; *Seiden* v. *United States*, 16 F. (2d) 197, 199; *Colasurdo* v. *United States*, 22 F. (2d) 934, 935; *Cardenti* v. *United States*, 24 F. (2d) 782, 783; *Mangiaracina* v. *United States*, 40 F. (2d) 164, 166; *Stark* v. *United States*, 44 F. (2d) 946, 949, 950. And see *Faraone* v. *United States*, 259 Fed. 507, 509; *Sharp* v. *United States*, 280 Fed. 86, 89.

The general principle, and we think the correct one, underlying the foregoing decisions is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment

the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendants possession or control. See Chamberlayne's Modern Law of Evidence, Vol. 2, Sec. 983; Greenleaf on Evidence, 16th Ed., Vol. 1, Sec. 79, p. 154; *Wilson* v. *United States*, 162 U. S. 613, 619; *Dunlop* v. *United States*, 165 U. S. 486, 502, 503; *Mobile, etc. Railroad* v. *Turnipseed*, 219 U. S. 35, 42; *Yee Hem* v. *United States*, 268 U. S. 178, 185.

The only decision called to our attention which seems in conflict with those cited above is *Mansbach* v. *United States*, 11 F. (2d) 221, 223, 224. And with the doctrine there apparently approved, so far as in conflict with the commonly accepted view, we cannot agree.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.